(17)

No. 03-1566
Title: Francis A. Orff, et al., Petitioners
v.
United States, et al.
Docketed: May 20, 2004
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (00-16922)
Decision Date: February 18, 2004
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 18 2004	Petition for a writ of certiorari filed. (Response due June 21, 2004)
Jun 10 2004	Waiver of right of respondent Westlands Water District to respond filed.
Jun 15 2004	Order extending time to file response to petition to and including July 21, 2004, for all respondents.
Jul 21 2004	Brief of respondent United States in opposition filed.
Jul 21 2004	Brief of Intervenors-Respondents Natural Resources Defense Council, et al. in opposition filed.
Jul 28 2004	Reply of petitioners Francis A. Orff, et al. filed.
Aug 4 2004	DISTRIBUTED for Conference of September 27, 2004.
Oct 4 2004	DISTRIBUTED for Conference of October 8, 2004.
Oct 12 2004	Petition GRANTED.
Nov 24 2004	Brief of petitioners Francis A. Orff, et al. filed.
Nov 24 2004	Brief amici curiae of Central San Joaquin Water Conservation District, et al. filed.
Nov 24 2004	Joint appendix filed.
Dec 15 2004	SET FOR ARGUMENT ON Wednesday, February 23, 2005.
Dec 16 2004	CIRCULATED.
Dec 22 2004	Extension of time within which to file the respondents' briefs on the merits to and including January 7, 2005.
Jan 7 2005	Brief of respondent United States filed. (Distributed)
Jan 7 2005	Motion for leave to file amici brief filed by Pacific Legal Foundation, et al. (Distributed)
Jan 7 2005	Brief of respondents Natural Resources Defense Council, et al. filed. (Distributed)
Jan 7 2005	Brief of respondent Westlands Water District in opposition filed. (Distributed)
Jan 7 2005	Brief amici curiae of Central Arizona Water Conseration District, et al. filed. (Distributed)
Jan 7 2005	Brief amici curiae of California, et al. filed. (Distributed)
Jan 10 2005	Record received from U.S.C.A. - 9th Circuit. (1 envelope)
Jan 12 2005	Opposition of Intervenor-respondents Natural Resources Defense Council to motion of Pacific Legal Foundation for leave to file amicus brief filed. (Distributed).
Jan 14 2005	Motion for divided argument filed by respondent Westlands Water District.
Jan 19 2005	Application (04A643) to file the reply brief on the merits in excess of page limits, submitted to Justice O'Connor.
Jan 21 2005	Record received from U.S.D.C. for Eastern Dist. of California (4 boxes)
Jan 24 2005	Motion for divided argument filed by respondent GRANTED.

Jan 24 2005	Motion for Pacific Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
Jan 26 2005	Application (04A643) denied by Justice O'Connor.
Feb 11 2005	Reply of petitioners Francis A. Orff, et al. filed. (Distributed)
Feb 23 2005	Argued. For petitioners: William M. Smiland, Los Angeles, Cal. For respondent United States: Jeffrey P. Minear, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent Westlands Water District: Stuart L. Somach, Sacramento, Cal.

Supreme Court, U.S.
FILED

031566 MAY 18 2004

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No. ____

IN THE

Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether farmers are "intended" third-party beneficiaries of their irrigation district's water service and repayment contracts with the U.S. Bureau of Reclamation and, therefore, entitled to sue the Bureau for breach thereof, as the Federal Circuit has long held, or merely "incidental" third-party beneficiaries and, therefore, not so entitled, as the Ninth Circuit holds in the decision below.

LIST OF PARTIES

The plaintiffs and appellants below, petitioners here, are Francis A. Orff; Brooks Farms II; Brooks Farms IV; Brooks Farms V; G.S. Farms; Five-D Westside Farms, Inc.; R&S Farming; Cardella Ranch; Gramis Family Farms II; Edwin R. O'Neill, BRO Partnership; BTO Partnership; EJC Partnership; ERO Partnership; JEO Partnership; SLO Partnership; TBO Partnership; C.S. Stefanopoulos Trust; Elena Stefanopoulos Trust; Estate of Helen Stefanopoulos; D.D. Stefanopoulos Trust; Pagona Stefanopoulos; Sumner Peck Ranch, Inc.; Y. Stephen Pilibos; and Pilibos Children's Trust.

Westlands Water District intervened in the Court of Appeals as an appellant.

The defendants and appellees below, respondents here, are United States of America; United States Department of the Interior; Bureau of Reclamation; Fish and Wildlife Service; United States Department of Commerce; National Marine Fisheries Service; Ronald H. Brown, Secretary of Commerce; and Bruce Babbitt, Secretary of Interior.

Parties who intervened below as defendants and appellees are Natural Resources Defense Council; United Anglers of California; Save San Francisco Bay Association; California Waterfowl Association; Sierra Club; Bay Institute of San Francisco; Environmental Defense Fund; California Striped Bass Association; Trout Unlimited of California; Sacramento River Council; California Sportfishing Protection Alliance; Pacific Coast Federation of Fisherman's Associations; the Wilderness Society.

CORPORATE DISCLOSURE STATEMENT

None of the petitioners has a parent corporation nor a nonwholly owned subsidiary.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Orff, et al. v. United States, et al.*, 358 F.3d 1137 (9th Cir. 2004). Appendix A. The Ninth Circuit affirmed the district court's unreported Final Judgment, filed August 11, 2000 and Memorandum Opinion and Order re Federal Defendants' Motion to Reconsider, filed April 12, 2000. Appendices B, C.

STATEMENT OF JURISDICTION

The Ninth Circuit's judgment was entered February 18, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This petition presents a question of federal government contract law which is not dependent on statute. *U.S. v. Seckinger,* 397 U.S. 203, 209 n. 12 (1970), *reh'g denied,* 397 U.S. 1031 (1970); *U.S. v. County of Allegheny,* 322 U.S. 174, 183 (1944), *overruled on other grounds, U.S. v. City of Detroit,* 355 U.S. 466, 471 (1958). A statute under which the question arises is 43 U.S.C. § 390uu. Appendix D.

STATEMENT OF THE CASE

A. The Reclamation Program

The Bureau of Reclamation of the U.S. Department of the Interior constructs and operates water projects in the 17 western states and sells and delivers irrigation water for use by farmers.[1] The reclamation legislation was originally enacted in 1902 and has been repeatedly amended by Congress. The quantity of water to be sold and delivered by the Bureau and bought and used by farmers in a given service area, and the payments to be made by the farmers therefor, are governed by that legislation, as well as the reclamation contracts, water rights, and judicial decrees which implement it.[2] The program depends, in major part, on the contract and property rights which arise in connection with its implementation.

During the first quarter century of the program's existence, the Bureau contracted directly with individual farmers or groups of farmers. However, in 1926 Congress directed that

[1] This Court described the reclamation program in *Nevada v. U.S.,* 463 U.S. 110, 115, 128 (1983), *reh'g denied,* 464 U.S. 875 (1983).

[2] "The legislation establishing and expanding these projects has created a highly complex system of rights and interests, some in the Government, some in the districts, some in the individual water users . . .." *Burley Irrigation District v. Ickes,* 116 F.2d 529, 539 (D.C. Cir. 1940), *cert. denied,* 312 U.S. 687 (1941).

no water shall be delivered upon the completion of any new project until a contract or contracts shall have been made with an irrigation district or districts organized under state law providing for payment of the cost of constructing and operating and maintaining the waterworks. 43 U.S.C. § 423(e).[3] In 1939 Congress delineated in greater detail the nature and function of "repayment" contracts under which the Bureau recovers the costs of internal distribution works. *Id.* at § 485h(d). It also provided for the Bureau's use of "service" contracts to recover the costs of major supply works. *Id.* at § 485h(e). Legislation enacted in 1956 provided that a party to any repayment or service contract shall have a first right to a stated share or quantity of the project's available water supply for beneficial use on the irrigable lands within its boundaries. 43 U.S.C. § 485h-l(4).[4]

Property principles also pervade the reclamation program. Section 8 of the 1902 act provides that nothing therein shall be construed to interfere with the laws of any state relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Bureau, in carrying out its provisions, shall proceed in conformity with such laws, and nothing therein shall in any way affect any right of any landowner, appropriator, or user

[3] The overall purpose of the 1926 legislation was "to provide relief to settlers," not "to change the policy of reclamation law." *Yellen v. Hickel,* 335 F.Supp. 200, 204 (S.D. Cal. 1971), *rev'd on other grounds,* 559 F.2d 509 (9th Cir. 1977), *on rehearing,* 595 F.2d 525 (9th Cir. 1979), *reversed and vacated in part sub nom., Bryant v. Yellen,* 447 U.S. 352 (1980), *reh'g denied,* 448 U.S. 911 (1980). An irrigation district is resorted to by the Bureau and farmers "for convenience" in the distribution of water and the collection of charges. *Nampa & Meridian Irrigation District v. Bond,* 283 F. 569, 570 (D. Id. 1922), *aff'd,* 288 F. 541 (9th Cir. 1923), *aff'd.,* 268 U.S. 50 (1925).

[4] The Bureau is bound to perform its contracts. *E.g., U.S. v. Coachella Valley County Water District,* 111 F.Supp. 172, 180 (S.D. Cal. 1953) ("A contract is a contract . . .").

of water. 43 U.S.C. §§ 383, 485h-4. The 1902 act further provides that the right to the use of water acquired thereunder shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right. *Id.* at §§ 372, 485h-4. This Court has explicated these property rights in several landmark cases. The right to use the water is acquired by prior appropriation. *Ickes v. Fox,* 300 U.S. 82, 95 (1937), *reh'g. denied,* 300 U.S. 640 (1937). The appropriation is perfected by application of the water to the land by the farmers. *Nevada*, 463 U.S. at 116; *Nebraska v. Wyoming,* 325 U.S. 589, 614 (1945). The water right is the property of individual landowners. *Ickes*, 300 U.S. at 95; *Nebraska,* 325 U.S. at 615-16. Such right is part and parcel of the land on which the water has been applied. *Ickes,* 300 U.S. at 95-96.

B. The Water Rights of Petitioners

The Central Valley Project in California was authorized in 1937 and reauthorized in 1954. 50 Stat. 844 (Aug. 26, 1937); 68 Stat. 879 (Aug. 27, 1954). The CVP's key feature is Shasta Dam at the northern reaches of the Sacramento River. Water collected behind it is released by the Bureau, flows southward to the Sacramento-San Joaquin Delta, and is diverted by opening the gates of the Delta cross channel located in the north of the Delta and distributed from the Delta to various CVP units.[5]

In anticipation of the authorization and construction of the San Luis Unit, to be located in the southwestern sector of the CVP, various farmers on the west side of the San Joaquin Valley organized the original Westlands Water District in 1952 under the California Water District Law. California Water Code § 34000 et seq. [6] The original Westlands district

[5] The CVP is described in *Dugan v. Rank,* 372 U.S. 609, 611-14 (1963).

[6] A water district is treated for certain purposes as a special-purpose unit, not a general-purpose government. *Salyer Land Co. v. Tulare Lake*

was a 400,000 acre area, and petitioners now farm there. California water districts are authorized to contract with the Bureau for irrigation water. *Id.* at § 35875 et. seq. The right to use water acquired thereunder shall be furnished in accord with federal reclamation law. *Id.* at § 23200.[7]

The original Westlands district filed an application for state water rights in 1954. It assigned that application to the Bureau in 1960. The Bureau requested such assignment because the application carried a preferred priority date and assignment would expedite construction of the Unit. It promised that a permanent water supply for the district would be assured and made available pursuant to a reclamation contract.

The Bureau subsequently obtained the necessary water rights to build the Unit. The state water rights board rendered four decisions which ordered that permits be issued to the Bureau for the benefit of the farmers who were to be the true owners of the permanent right to use the water, which right shall be appurtenant to the land to which the water is applied. Decision D-893, 1958 WL 5645 at 34; Decision D-935, 1959 WL 5685 at 47-50; Decision D-990, 1961 WL 6816 at 37; Decision D-1020, 1961 WL 6846 at 10.

The San Luis Unit was authorized by Congress in 1960. Pub. L. 86-488, 74 Stat. 156 (June 3, 1960). Section 1(a) of the 1960 act establishes the principal purpose of the Unit as furnishing irrigation water and the service area as the west side of the San Joaquin Valley.[8] It provides that the principal

Basin Water Storage District, 410 U.S. 719, 726-35 (1973); *Ball v. James,* 451 U.S. 355, 362-72 (1981). California law is to similar effect. *Not About Water v. Board of Supervisors*, 116 Cal.Rptr.2d 526, 536-39, 95 Cal.App.4th 982 (2002).

[7] An irrigation district is obligated to deliver reclamation project water to its farmers. *Bryant*, 447 U.S. at 371 n. 23.

[8] The authorizing legislation was discussed in a recent case brought by original Westlands farmers against the Bureau challenging its failure to

engineering features shall include, among other things, the San Luis Dam and Reservoir, the San Luis Canal, and intra-district distribution systems. The act mandates that construction shall not be commenced until the Bureau has secured all rights to the use of water necessary to carry out the purposes of the Unit. The original Westlands district embraced the majority of the Unit's service area. Water for the Unit flows to the Tracy Pumping Plant located in the south of the Delta, is pumped south through the Delta-Mendota Canal, is stored in the San Luis Reservoir, and thereafter resumes its flow through the San Luis Canal and, then, the district's internal distribution system to farmers' lands.

The farmers in the original Westlands area are third-party beneficiaries of a 1963 water service contract between the original Westlands district and the Bureau pursuant to which they bear their share of the costs of constructing and operating and maintaining the major project supply facilities. They are also beneficiaries of a 1965 repayment contract pursuant to which they repay the costs of the internal distribution system. Recordable contracts were also made by the Bureau and most landowners or their predecessors in the late 1960s and early 1970s relating to the sale of land in excess of acreage limits. All these contracts contain preambles and recitals stating they were made pursuant to federal reclamation statutes.[9]

Article 3(d) of the 1963 contract provides that each year the Bureau "shall furnish" 900,000 acre-feet of water to the district for use on its eligible lands. [10]

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provide drainage service. *Firebaugh Canal Co. v. U.S.*, 203 F.3d 568, 570, 571, 573-74 (9th Cir. 2000).

[9] The terms of a government contract include the authorizing statutes in effect at the time it was made. *Lynch v. U.S.*, 292 U.S. 571, 577 (1934).

[10] The quantity terms of the 1963 contract were later discussed by the Ninth Circuit in *O'Neill v. U.S.*, 50 F.3d 677, 680 (9th Cir. 1995), *cert. denied*, 516 U.S. 1028 (1995).

Article 3(d) of the 1963 contract also provides that the original Westlands district "shall . . . pay for" the water under Article 6(a) thereof, which in turn provides that the water service component of the rate "may not be in excess" of $7.50 per acre foot.[11]

The farmers in the case at bar charge that the Bureau breached the above water quantity and water price terms of the 1963 contract. The petition before this Court also involves certain other terms thereof. In general, the 1963 contract provides that the benefits of using the water purchased thereunder, and the burdens of paying therefor, are enjoyed and borne by its farmers.[12]

For example, the 1963 contract recites that "lands within the boundaries of the District are at present in need of additional water for irrigation . . . and that an additional water supply to meet these present and potential needs can be made available by and through the works constructed . . . by the United States." Articles 1(a) and 12 provide that the water furnished thereunder is for "agricultural use," defined as water use "in the commercial production of agricultural crops or livestock." Article 3(f) provides that the "right to the beneficial use of water . . . shall not be disturbed . . . ." Article 5 prohibits water from being "sold or otherwise disposed of for use outside" the district. Articles 14, 16, and 17 provide that the payments for water service are ultimately borne by farmers and secured by liens on their lands and that

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[11] The price terms were discussed in two cases involving claims by original Westlands farmers against the Bureau. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 899 F.2d 814, 816, 824-25 n. 17 (9th Cir. 1990), *cert. denied, Boston Ranch Co. v. Department of Interior*, 498 U.S. 998 (1990); *U.S. v. Westlands Water District*, 134 F.Supp.2d 1111, 1118, 1138-39 (E.D. Cal. 2001).

[12] Several cases have so noted. *Barcellos & Wolfsen*, 899 F.2d at 816 ("beneficiaries"); *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F.Supp. 715, 731, 732, 746 (E.D. Cal. 1993) ("third-party beneficiaries"); *U.S. v. Westlands*, 134 F.Supp.2d at 1156 ("real parties-in-interest").

Westlands, itself, neither uses the water nor bears the cost of paying therefor. Articles 23, 24 and 25 set forth the recordable contract and excess lands provisions required under reclamation law, which condition a water user's right to water upon compliance with such provisions. Article 29(b) of the 1963 contract refers to the "benefit that may arise by reason of this contract" to a landowner within the district.

In particular, Article 11(b) of the 1963 contract provides for an adjustment for water shortages as the remedy of "anyone having or claiming to have . . . through, or under the District the right to the use of any of the water supply provided for herein."[13] Article 9(c) similarly contemplates water being used for irrigation by "those claiming . . . through, or under the District."

Finally, Article 15 of the 1963 contract provides that water shall not be furnished for the benefit of any lands or water users, except upon the payment by the landowner of his assessment for such water. Article 15 specifies that:

> "Payment of charges at the rate and upon the terms and conditions provided for herein is a prerequisite to the right to the use of water furnished to the District pursuant to this contract, and no irregularity in levying taxes or assessments by the District nor lack of authority in the District, . . . shall be held to authorize or permit any water user or the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid by such water user." [14]

In July 1963, the original Westlands district filed an *in rem* action in state court to determine the validity of the 1963

[13] The Court of Appeals in the case at bar discussed this article in detail. Appendix A at 13a, 14a.

[14] The Court below also focused on this article. Appendix A at 11a-13a.

contract. This was done pursuant to Article 32 of the 1963 contract and applicable federal statutes. 43 U.S.C. §§ 423e, 511. In December 1963, the state court entered judgment validating the contract as against all persons.

Also in 1965, after the original Westlands district and the Bureau had signed the service and repayment contracts, the district and the former West Plains Water Storage District, a newer and smaller district on Westlands' western border, which had no contract with the Bureau, merged. California Water Code § 37800 et seq. Section 37856 thereof provides:

> "Lands which were within the Westlands Water District immediately prior to the merger shall, so long as said lands remain in the said district, have a prior right with respect to water to which said district was entitled under any contract with the United States in effect on the date of said merger over . . . lands added to the Westlands Water District as a result of the merger . . ."[15]

Between 1968 and 1978, the Bureau honored the pre-merger Westlands farmers' water rights under the quantity and price terms of the 1963 contract. Farmers in that area bought at least 900,000 acre-feet of water each year and paid $7.50 per acre-feet for such water service. Thereby, the water rights for the Unit were duly perfected and the appropriate share of project costs was duly repaid.[16]

But, starting in 1979 and lasting until 1986, the Bureau attempted to reduce water deliveries to pre-merger lands for supposed fish and wildlife purposes and to raise prices of the remaining water sold to the farmers for supposed budgetary purposes. District court litigation ensued among class

[15] The prior rights of pre-merger lands over merged lands was later discussed in *Sumner Peck Ranch*, 823 F.Supp. at 720-21, 726-27.

[16] The initial performance of the Bureau was addressed in *O'Neill*, 50 F.3d at 681.

representatives of pre-merger lands, class representatives of merged lands, the enlarged Westlands Water District, and the Bureau.[17]

During the course of the litigation several events occurred relating to the farmers' right to sue the Bureau for breach of the quantity and price terms of the 1963 contract. First, in 1980 the district court rejected the Bureau's defense of sovereign immunity. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 491 F.Supp. 263, 266-67 (E.D. Cal. 1980).[18] Second, in 1982 Congress enacted 43 U.S.C. § 390uu, which gave consent to join the Bureau as a necessary party in any district court suit to adjudicate the contractual rights of a contracting entity and the Bureau regarding any contract executed pursuant to federal reclamation law. Appendix D. Third, in 1984 the Court of Appeals for the Federal Circuit ruled in *H.F. Allen Orchards v. U.S.*, 749 F.2d 1571, 1576 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985), that farmers were "intended" third-party beneficiaries of their irrigation district's reclamation contracts with the Bureau and, thus, had standing to sue the Bureau for breach of those contracts.[19]

[17] This litigation was later discussed in several cases adjudicating claims by pre-merger farmers against the Bureau. *Barcellos & Wolfsen*, 899 F.2d at 817; *O'Neill*, 50 F.3d at 681; *U.S. v. Westlands*, 134 F.Supp. 2d at 1118-19.

[18] The court concluded it would adjudicate rights to the use of water acquired to operate the Unit, citing 43 U.S.C. § 666(a)(1) and *Dugan*, 372 U.S. at 618-19. It also concluded it would administer rights previously adjudicated, citing 43 U.S.C. § 666(a)(2) and *Federal Youth Center v. Jefferson County District Court*, 575 P.2d 395, 398 (Colo. 1978).

[19] The Court of Federal Claims has jurisdiction to render judgment upon any claim against the U.S. founded upon any express or implied contract with the U.S. 28 U.S.C. § 1492(a)(1).

The litigation was resolved in 1986 by a stipulated judgment. The judgment declared that the 1963 contract is "a valid, enforceable and implementable contract" and commanded that the Bureau "shall perform" it. It declared that the 1963 contract entitles the district to "water and other service" by the Bureau "as specified therein." It also awarded the farmers a refund of about $50 million for past overcharges and declared the future rate to be paid to the Bureau for water service to be "$7.50 per acre foot, as specified in the 1963 contract." The district explicitly acknowledged in the stipulated judgment that "it entered into the 1963 contract for the benefit of the [pre-merger area] and the lands therein." The stipulated judgment provided that a party may obtain relief against the Bureau for a future violation thereof or any contract obligation by way of either a motion to enforce the judgment or a new action. Finally, the court appointed representatives to protect the farmers in each area.[20]

C. Interim Litigation

But future sales of water in the quantity and at the rate originally agreed and subsequently ordered were not to be, and litigation between pre-merger area farmers and the Bureau was not to cease. Within a year of the 1986 stipulated judgment, Congress raised the water rate more than fivefold on farmers owning excess lands under extended recordable contracts. Farmers moved in district court to challenge the validity of this new surcharge. Their standing to sue the Bureau was not questioned, but their claim was rejected on the merits by the district court and, then, on appeal. *Barcellos & Wolfsen*, 899 F.2d at 821-26. The Ninth Circuit concluded

[20] The 1986 stipulated judgment was discussed in several of the subsequent cases involving farmers' claims against the Bureau. *Barcellos & Wolfsen*, 899 F.2d at 819, 825-26; *Sumner Peck Ranch*, 823 F.Supp. at 737, 738; *O'Neill*, 50 F.3d at 681; *U.S. v. Westlands*, 134 F.Supp.2d at 1120-21.

the 1963 contract was insufficiently explicit and, therefore, should be construed to allow the exercise of sovereign power. *Id.* at 824-25 n. 18.

Three suits relating to the failure to provide necessary drainage service were also pursued against the Bureau by farmers in the pre-merger area of Westlands during the 1990s. First, farmers owning excess lands claimed entitlement to the 1963 contract rate for so long as the Bureau failed to provide such service. The court upheld the farmers' claim. *U.S. v. Westlands*, 134 F.Supp.2d at 1134-44. It rejected the Bureau's sovereign power defenses. *Id.* at 1144-54.[21] The court also recognized the right of the farmers to recoup the payments they had made for drainage service which had not been provided. *Id.* at 1154-56. Second, farmers in Westlands' pre-merger area also filed a separate action seeking, among other things, to enforce the government's drainage obligations, including claims for contract damages. In *Sumner Peck Ranch,* the district court generally upheld the farmers' pleadings. 823 F.Supp. at 737-49. In particular, the court ruled that the farmers had standing to sue the Bureau for its failure to perform its contractual drainage duties. *Id.* at 745-47. Third, in *Firebaugh Canal Co.*, the Ninth Circuit affirmed in major part the district court's partial judgment compelling the Bureau to perform its drainage obligation. The Court held that Congress had mandated unambiguously in 1960 that the Bureau build necessary drains. 203 F.3d at 573-74. It ruled that the Bureau unlawfully withheld such action and that it must be compelled to perform its statutory duty under 5 U.S.C. § 706(1). *Id.* at 577-78.

[21] This Court had recently explicated the elements of these defenses. *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996); *see also Mobil Oil Exploration v. U.S.*, 530 U.S. 604 (2000).

Still another interim lawsuit was a precursor to the underdelivery claim in the case at bar. Original Westlands farmers sought specific performance of (but not money damages for) the Bureau's water delivery duty during the 1993 water year, and the Bureau defended on the ground that it had become impossible to honor the contract because of subsequent sovereign action. The Ninth Circuit affirmed the district court's rejection of the farmers' contract interpretation in *O'Neill.* 50 F.3d at 682-87. The Court also affirmed the district court's abstention as to evaluating the merits of the Bureau's defenses resting on alleged statutory and regulatory mandates. *Id.* at 687-89. It further affirmed that judicial review of such issues would take place, instead, in the case below. *Id.* at 680, 682. It described the underdelivery claim as a challenge to the Bureau's method of compliance with federal statutes. *Id.* at 688. It noted that this challenge includes the farmers' contentions that the underdeliveries were in violation of law and not mandated by law. *Id.* at 689 n. 7.

D. Proceedings Below

In the instant case farmers seek money damages from the Bureau charging two breaches of the 1963 contract. First, they charge the Bureau reduced the quantity of water it sold by about half (the reduction involved in *O'Neill*) in breach of the quantity terms. Second, beginning in the early 1990s the Bureau began assessing Unit farmers with "mitigation and restoration payments" under a new statute, as a result of which the farmers' price per acre-foot has been about twice the $7.50 per acre-foot contract rate.

The Westlands district originally instituted this suit in 1993. The farmers intervened later that same year.[22] In 1995

[22] The petitioners initially sought equitable relief on their underdelivery and overcharge claims under a due process theory. *Westlands Water District v. Department of Interior*, 850 F.Supp. 1388, 1397-98, 1401, 1408

the district was allowed to drop out of the case on specified terms. Thereafter, the farmers alone prosecuted their claims for money damages for breach of contract.

The main proceedings in the district court consisted of three rounds of cross-motions for partial summary judgment. In 1997 the court denied all motions on the merits. In 1998 the court denied the Bureau's motion which claimed, for the first time, that the farmers lacked standing to sue. It also made two rulings on the merits. First, the court dismissed petitioners' overcharge claim. Second, it narrowed, but did not dismiss, their underdelivery claim. As a consequence, the case was poised for trial on the farmers' underdelivery claim and the Bureau's claimed defenses.

In 2000 the case was disposed of when the district court reversed its prior ruling and held that the farmers lacked standing to sue. Appendix C. The Court ruled that the farmers were incidental, not intended, third-party beneficiaries of the 1963 contract in light of the Ninth Circuit's decision the year before in *Klamath Water Users Protective Assn. v. Patterson*, 204 F.3d 1206, 1210-12 (9th Cir. 1999), *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000), *cert. denied*, 531 U.S. 812 (2000).

The Ninth Circuit in the opinion below affirms the ruling that the farmers may not sue the Bureau. Appendix A at 5a-17a. Extending the rationale of *Klamath*, the Court holds that the farmers were incidental, not intended, third-party beneficiaries of the 1963 contract's quantity and price terms.

(E.D. Cal. 1994). The district court held on the Bureau's pleading motion that the farmers were entitled to pursue their claim that the underdeliveries were inconsistent with federal statutes. *Id.* at 1400, 1401, 1426-27. It granted them leave to amend their overcharge claim. *Id.* at 1408-09, 1426-27.

Appendix A at 11a-16a. The Court explicitly declines to follow the Federal Circuit's contrary 1984 decision in *H.F. Allen Orchards*. Appendix A at 14a n. 5.[23]

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE FEDERAL CIRCUIT AND THE NINTH CIRCUIT ON THE IMPORTANT QUESTION OF WHETHER A FARMER IS AN INTENDED THIRD-PARTY BENEFICIARY OF A RECLAMATION CONTRACT BETWEEN HIS OR HER IRRIGATION DISTRICT AND THE BUREAU OF RECLAMATION, AS THE FEDERAL CIRCUIT HAS LONG CORRECTLY HELD, OR AN INCIDENTAL BENEFICIARY, AS THE NINTH CIRCUIT INCORRECTLY HOLDS.

There are three reasons why review is warranted. First, the Ninth Circuit's decision below directly conflicts with a ruling published twenty years ago by the Federal Circuit, a ruling that has been unquestioned and relied upon by both farmers and the Bureau ever since. Second, whether a farmer is an intended or incidental beneficiary of his or her district's contract with the Bureau is important, especially where the district, as is often the case, is unwilling or unable to assert against the Bureau a claim of breach of contract. Third, the reasoning of the Federal Circuit took into due account the nature of the parties and the structure of the legal and economic relations among them, whereas the Ninth Circuit's decision below simply rests on an unwarranted presumption and an inappropriate mode of contract construction.

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[23] The Ninth Circuit also vacates the district court's earlier merits rulings which had narrowed the farmers' underdelivery claim and dismissed their overpayment claim. Appendix A at 17a-20a.

A. The Federal Circuit has long held that a farmer is an intended third-party beneficiary of his or her district's reclamation contract with the Bureau, but the Ninth Circuit now holds that he or she is merely an incidental beneficiary thereof.

Prior to 1984 a number of state law cases had held that a property owner was an intended third party beneficiary of a contract under which his or her city purchased water service from a water supplier. [24]

In the *H.F. Allen Orchards* decision of 1984, the Court of Appeals for the Federal Circuit announced the rule, consistent with such line of cases, that a farmer is an intended third-party beneficiary of his or her irrigation district's reclamation contract with the Bureau. The facts of that case were that in 1905 the Bureau constructed the Yakima Project in eastern Washington. It initially contracted directly with farmers in the Yakima Valley to provide them with water service from the project. After the 1926 amendments to the reclamation act, farmers established under Washington law ten irrigation districts within the project, and each such district then made a repayment contract with the Bureau. In 1937 this Court analyzed the water rights of farmers in the Yakima Project in the *Ickes* case. In 1943 the Court of Appeals for the D.C. Circuit affirmed that the water rights were property of the farmers, water thereunder was to be distributed under state law priorities, the quantity was to be determined by actual use, and use is reasonable where water is diverted and applied using methods customary in the locale. *Fox v. Ickes*, 137 F.2d 30, 33, 35 n. 9 (D.C. Cir. 1943), *cert. denied*, 320 U.S.

[24] *See, e.g., Woodbury v. Tampa Waterworks Co.*, 49 So. 556, 559-62 (Fla. 1909); *Pineville Water Co. v. Bradshaw*, 266 S.W.2d 305 (Ky. 1954); *Potter v. Carolina Water Co.*, 116 S.E.2d 374 (N.C. 1960); *Harris v. Board of Water and Sewer Commission*, 320 So.2d 624, 628 (Ala. 1975).

792 (1943). In 1945 still further litigation seeking to determine the specific water rights of all project farmers was resolved by consent decree. Under that decree, senior water rights were not proratable, whereas junior water rights were proratable, in the event of shortage. Thereafter, the districts and the Bureau made new or amended reclamation contracts which incorporated the terms of the consent decree. In 1977, a drought year, the Bureau initially projected that the junior right holders would be able to buy that year only a small portion of the water to which they were otherwise entitled. They responded by fallowing much of their land. A wet spring, however, ultimately resulted in deliveries that year aggregating 70% of normal. About 160 out of many thousands of junior right holders, who had been unable to persuade any of their districts to sue the Bureau, sued it themselves, claiming that the initial estimate violated an implied promise in their districts' contracts. The claims court ruled, among other things, that the farmers could not sue the Bureau directly. *H.F. Allen Orchards v. U.S.*, 4 Cl.Ct. 601, 607-13 (1984).[25] However, the Federal Circuit reversed on this point, holding, as follows:

> "[W]e disagree with the Claims Court's determination that appellants were not correct parties to sue under the consent decree and subsequent alleged implied contracts. It is undisputed that appellants have a property right in the water to the extent of their beneficial use thereof. *Fox v. Ickes, supra.* The irrigation districts, which contracted with the Bureau, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the

[25] The court cited a conflicting line of cases decided under state law holding that property owners were only incidental third-party beneficiaries of their cities' contracts with water suppliers, such as *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 231-32 (1912) and *H.R. Moch Co., Inc. v. Rensslaer*, 247 N.Y. 160, 164-66, 159 N.E. 896, 897-98 (1928). 4 Cl. Ct. at 610.

> government supplies. It is clear that the appellants, owners of the property at issue, the water, also are intended third-party beneficiaries of the 1945 Consent Decree. Under the rules of the Claims Court 'every action shall be prosecuted in the name of the real party in interest.' Claims Court R. 17(a). Here the farmers, owners of the water and beneficiaries of the irrigation projects, are the true parties in interest." *H.F. Allen Orchards*, 749 F.2d at 1576.[26]

Allen Orchards has since been cited and followed by the claims court in analogous contexts. *Busby School of Northern Cheyenne Tribe v. U.S.*, 8 Cl. Ct. 596, 602 (1985) (tribe members were intended third party beneficiaries of a contract between their tribally-elected school district and a federal agency); *Schuerman v. U.S.*, 30 Fed. Cl. 420, 430 (1994) (borrowers were intended beneficiaries of a contract between their lender and a federal agency).[27] Another claims court case holds that an equipment rental company was the intended third-party beneficiary of a road construction contract between a tribe and the government. *Carlow v. U.S.*, 40 Fed.Cl. 773, 779-83 (1998). *H.F. Allen Orchards* was also cited by the claims court in *General Dynamics Corp. v. U.S.*, 47 Fed. Cl. 514, 531-32 (2000), for the proposition that a

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[26] The Ninth Circuit notes in the decision below that in *H.F. Allen Orchards* the Federal Circuit "based its conclusion on the fact that the farmers were beneficial users of the water who ultimately paid for it." Appendix A at 14a n. 5.

[27] *Schuerman* holds that the proper test is "whether the contract reflects the express or implied intention of the parties to benefit the third party." 30 Fed.Cl. at 433. The plaintiff need not also show that the contract gives him or her the direct right to enforce the contract. *Id.* at 428, 429. The court discussed Section 313(2) of the *Restatement (Second) of Contracts* (1979) which discusses situations where the promisee is a "government" which contracts to benefit the "public" at large. *Id.* at 429, 430, 433. The Federal Circuit follows the test announced in *Schuerman*. *Montana v. U.S.*, 124 F.3d 1269, 1274 (Fed. Cir. 1997).

parent corporation was the real party in interest to sue the government for breach of a contract to design a submarine made by its wholly-owned subsidiary.

A case similar to *H.F. Allen Orchards* as to facts, reasoning, and outcome is *Henderson County Drainage District v. U.S.*, 53 Fed.Cl. 48 (2002), *reconsideration denied*, 55 Fed.Cl. 334 (2003). In 1961 drainage districts, which existed for the purpose of benefitting the farmers who had created them, made contracts with the Army Corps of Engineers to settle drainage claims arising from the Corps' operation of a water project. More than three decades later, farmers within the districts sued to enforce the contracts. The Court of Federal Claims held that they had standing, finding that the farmers would be reasonable in relying on the promises made in the contracts as manifesting an intent to create a right. *Id.* at 52.

At all times between 1984 and 2004, *H.F. Allen Orchards* remained the only circuit court decision to have ruled on the specific issue at bar. However, the Ninth Circuit in the case below explicitly declines to follow *H.F. Allen Orchards* and reaches the opposite conclusion, extending the reasoning of its 1999 *Klamath* decision.

In *Klamath* the Bureau made repayment contracts with irrigation districts within the Klamath Project. But the Bureau also contracted with a hydroelectric power company, which was not affiliated with the farmers, to operate a dam in that project. For nearly a century the contracts with the districts and the power company were honored by the Bureau. However, in 1977, in order to serve certain fish and wildlife purposes, the Bureau adopted a new operating plan under which it would sell less water to the districts than specified in their repayment contracts. The power company thereafter operated the dam in accord with the Bureau's new plan, which had the effect of reducing water deliveries to the farmers. Farmers sued the Bureau and the power company

for a declaration of their rights under the dam operation contract only. The farmers did not sue the Bureau to enforce their water rights under their districts' repayment contracts. The district court held that the farmers were not intended third-party beneficiaries of the dam operation contract between the Bureau and the power company. *Klamath Water Users Assn. v. Patterson,* 15 F.Supp.2d 990 (D. Or. 1998).[28] The court noted: "Reclamation must deliver water to project irrigators in accordance with the rights held by the United States in the project and the irrigators' individual repayment contracts, ..." *Id.* at 995. It concluded: "The [dam operation] contract is not the source of plaintiffs' rights to water in the Klamath Basin. Rather, their water rights are found primarily in their individual repayment contracts with the federal government and in state water law." *Id.* at 996. The Ninth Circuit affirmed. The Court relied primarily on Sections 302 and 313(2) of the *Restatement (Second) of Contracts* as the governing legal authority. *Klamath,* 204 F.3d at 1211.[29] It first stated that members of the public who benefit from a contract with their government are "generally assumed" to be incidental rather than intended beneficiaries. *Id.* Then it held that the Bureau's dam operation contract with the hydroelectric power company revealed no express or implied "intention" of either signatory to grant irrigators served by the project enforceable rights and, indeed, that the plain language of that contract was sufficient to "rebut" such contention. *Id.* The Court reasoned that recognizing any farmer's standing to sue under the dam operation contract would "open the door" to all to sue. *Id.* at 1212.

[28] The court cited *German Alliance Insurance* and other cases. *Id.* at 994. It did not cite *H.F. Allen Orchards.*

[29] The Ninth Circuit, like the district court, did not discuss *H.F. Allen Orchards.*

In the case at bar, the district court ruled in its 2000 opinion that, in light of *Klamath*, the farmers are "incidental," not "intended," third-party beneficiaries and, therefore, lack "standing" to sue. Appendix C at 29a-34a. The court found that the 1963 service contract contains no "direct right to sue" nor "enforcement rights." *Id.* at 31a. It relied on *Klamath*, but did not cite *H.F. Allen Orchards.*[30] *Id.* at 28a-31a.

On appeal below the Ninth Circuit affirms. Its decision extends *Klamath* and holds that the farmers in a reclamation project are "incidental" rather than "intended" third-party beneficiaries of a service or repayment contract between their district and the Bureau. Appendix A at 9a-14a. The Court holds it is "presumed" that members of the public who benefit from a contract made by a government are incidental third-party beneficiaries unless the contract evidences a "clear intent" to the contrary. *Id.* at 10a. While acknowledging that the 1963 service contract operates to the farmers' "benefit," and was entered into with them "in mind," it holds that that was "not enough" to confer standing to sue for breach of contract. *Id.* at 14a. The Court notes that its conclusion "may be at odds" with *H.F. Allen Orchards. Id.* at 14a n. 5. But it explicitly states: "To the extent that the Federal Circuit employs a different approach and reaches a different result, we respectfully disagree." *Id.*

[30] While the decision was on appeal, the same district court discussed it in two other reported decisions. The court ruled in *U.S. v. Westlands* that its decision below did not govern the farmers' claims. The court noted that the farmers in that case were the "real parties-in-interest" against the Bureau. 134 F.Supp.2d at 1156. It also stated: "No one else is willing to litigate these claims on their behalf." *Id.* The Bureau also relied on the district court's ruling in the instant case in another case, but the court did not rely upon it. *Del Puerto Water District v. Bureau of Reclamation*, 271 F.Supp.2d 1224, 1247-49, 1251 (E.D. Cal. 2003).

Thus, the Ninth Circuit has now declared a contractual standing rule which directly conflicts with the rule declared by the Federal Circuit in 1984. Under *H.F. Allen Orchards*, a farmer may sue the Bureau and obtain redress as an intended third-party beneficiary of his or her district's reclamation contract. The reasoning of that decision was founded on the fundamental nature and function of the Bureau, an irrigation district, and its farmers, as well as the legal and economic relations among them, in a federal reclamation project. Under the Ninth Circuit's new decision below, however, a farmer may not sue the Bureau nor secure a remedy for breach of the district contract, because he or she is merely deemed an incidental third-party beneficiary. Farmers are presumed incidental, because an irrigation district is a government and a farmer is a member of the public, and the presumption may be rebutted only by contract language of a clear intent to the contrary.

B. The issue whether a farmer is an intended or incidental third-party beneficiary of a reclamation contract between his or her irrigation district and the Bureau is important.

The Bureau has built and operates over 600 dams in the West which serve almost 10 million acres. Amy K. Kelley, "Federal Reclamation Law," in Robert E. Beck, Ed., *Waters and Water Rights* (Michie, Charlottesville, 1996) at § 41.02. Irrigation districts have made thousands of repayment or service contracts with the Bureau, and hundreds of thousands of farmers buy irrigation water thereunder.

Contracts are a key part of the reclamation program, and their performance repays the costs of the projects. Furthermore, farmers who apply the contracted water supply to irrigate crops thereby perfect the property rights required for project viability. These contract and property principles are largely what have made the reclamation program what it is.

The Bureau traditionally and generally lived up to its promises and honored farmers' rights.

But in recent decades new conditions severely challenge the traditional reclamation system. Budget-conscious legislators and executives look for new opportunities to impose extra-contractual water charges on farmers. Ever-growing urban areas explore ways and means to succeed to irrigators' water rights. And, most significant of all, private interest groups press their governments to take action to reallocate irrigation water to other in-stream uses under multiple environmental statutes.

Often an aggrieved farmer can count on his or her irrigation district to mount a legal challenge to political action which threatens to violate his or her water or water rights without payment of compensation. But there are many situations where districts decline to do so and farmers are left to fend for themselves.

One class of such cases embraces situations where a district represents two or more groups of farmers with differing rights, priorities, and interests. The two decisions creating the conflict in the circuits which is the subject of this petition aptly illustrate this phenomenon. In *H.F. Allen Orchards* the districts represented senior rights which could not be prorated, as well as junior rights which could. 4 Cl.Ct. at 604. Only junior rights, representing a minority in each district, were adversely affected by the Bureau's action, and the holders thereof were not able to persuade any district to prosecute a claim. *Id.* at 613 n. 8. Similarly, in the case at bar, as a result of the 1965 merger, there were two legislatively-created classes of farmers within the enlarged Westlands district, and as a result of the 1986 stipulated judgment each class was represented by judicially-appointed area representatives. The senior right holders were left to prosecute their own claims after Westlands dropped out of the case. Where a district is unable or unwilling to protect one

class of farmers because of the rights, priorities, or interests of a second class, the former are denied access to the courts to protect themselves if they are merely incidental.

A second situation in which the rights and interests of farmers differ from their irrigation district is where the alleged contract breach has already been consummated (the water has been reallocated, or the surcharges have been collected), and the remedy sought is retroactive money damages. In such cases, there exists doubt as to whether a district has standing to assert and recover a farmer's damages.[31] To the extent a district does have standing, there is the question of whether it has sufficient incentive to sue.

The question whether farmers have access to the federal courts when their district is unable or unwilling to sue the Bureau for breach of a reclamation contract, as in *H.F. Allen Orchards* and the case at bar, should be resolved by this Court. It is untenable that a farmer is an "incidental" third-party beneficiary of his or her district's contract if suit is brought in a district court of the Ninth Circuit, but an "intended" beneficiary if brought in the Court of Federal Claims. The breach of contract is the same in either forum, and standing should also be the same.

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[31] A district may have standing to recover overcharges. *Tulelake Irrigation District v. U.S.*, 342 F.2d 447 (Cl.Ct. 1965). It may also be able to seek at least its own damages for underdeliveries. *Flathead Joint Board of Control v. U.S.*, 30 Fed.Cl. 287, 295 (1993), *aff'd*, 59 F.3d 180 (Fed. Cir. 1995). But there is significant doubt it can prevail on such a claim for the direct benefit of its landowners. *San Carlos Irrigation and Drainage District v. U.S.*, 111 F.3d 1557, 1561-64 (Fed. Cir. 1997). Petitioners are aware of no case allowing a district to recover its farmers' lost profits arising from underdeliveries. On the other hand, assuming a farmer is an intended third party beneficiary, he or she would be able to recover his or her own damages. *Sumner Peck Ranch*, 823 F.Supp. at 746-47 (lack of service); *U.S. v. Westlands*, 134 F.Supp.2d at 1142-44 (excessive charges).

It is not a sufficient response that farmers, while denied a hearing in the district courts of the Ninth Circuit, can still pursue their contract claims in the Court of Federal Claims. A district court suit allows farmers to join with their contract claim a claim under the Administrative Procedure Act for violation of statute or the Constitution. It would be extremely inefficient both for the judiciary and litigants to require injured farmers to challenge Bureau misconduct first in the district court for prospective equitable relief and then in the claims court for retroactive monetary relief, if such a two-step procedure is permissible at all. Both challenges are based on the same misconduct and should be heard at the same time by the same court.

C. The Federal Circuit's well-established rule is correct, and the Ninth Circuit's conflicting new rule is incorrect.

The Ninth Circuit judges below "disagree" with the approach taken by the Federal Circuit and the result in *H.F. Allen Orchards*. Appendix A at 14a n. 5. But, except for that conclusionary statement of disagreement, the Court does not address the basic facts relied upon or the reasoning utilized in *H.F. Allen Orchards*. An examination of those matters demonstrates the correctness of the Federal Circuit's rule.

In *H.F. Allen Orchards* the Federal Circuit noted that reclamation project farmers have a "property right" in the water, are the "owners" of such property, and are the "beneficiaries" of the irrigation project. 749 F.2d at 1576. It is the farmers' use of the water which perfects the water right. *Nevada*, 463 U.S. at 116; *Nebraska*, 325 U.S. at 614. The right is appurtenant to their lands. 43 U.S.C.§§ 372, 485h-4. The Ninth Circuit ignores, and thereby treats as irrelevant, these fundamental facts.

The Federal Circuit's decision stated that districts contract with the Bureau as a "surrogate" for the aggregation of farmers. *H.F. Allen Orchards,* 749 F.2d at 1576. Another court called a district, in practical effect, nothing but an "intermediary" resorted to by the Bureau and the farmers. *Nampa & Meridian,* 283 F. at 570. The Ninth Circuit, itself, referred to Westlands Water District as a "middleman." *Barcellos & Wolfsen*, 899 F.2d at 824 n. 16. Once more, however, the Ninth Circuit does not address this fact in the decision below.

H.F. Allen Orchards held that farmers are "true parties in interest." 749 F.2d at 1576. Another court had also so held. *Nampa & Meridian*, 283 F. at 570. Even the district court below so ruled in another case involving farmers in the pre-merger Westlands area. *U.S. v. Westlands*, 134 F.Supp.2d at 1156.[32] But the Ninth Circuit here ignores these holdings.

The *H.F. Allen Orchards* court also noted that it is the farmers who ultimately "pay" for the services which the Bureau provides. 749 F.2d at 1576. Water diverted from irrigation to environmental purposes, as in the case at bar, does not get paid for by anyone. Federal deficits grow unless, as here, extra-contractual surcharges are added to the contractual charges for the remaining water which is delivered to irrigators. Again, the Court below is silent about these economic realities.

The Ninth Circuit fails to consider still other relevant factors. The original Westlands district was created by its farmers for the purpose of entering into service and re-

[32] Every action shall be prosecuted in the name of the real party in interest. Fed. R. Civ. Proc., Rule 17(a); R. Ct. Fed. Cl., Rule 17(a). Several circuit court decisions have addressed the third-party beneficiary issue in terms of the real party in interest rule. *Iowa Public Service Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 405-06 (8th Cir. 1977); *Capital Fire Insurance Co. v. Langhorne*, 146 F.2d 237, 241-43 (8th Cir. 1945).

payment contracts with the Bureau. The 1986 stipulated judgment among the two groups of farmers, Westlands, and the Bureau explicitly provided that the 1963 contract had been entered into for the benefit of those farmers' lands and it specified how a farmer or his or her area representatives could obtain judicial relief against the Bureau in the future. But the Court below ignores these basic facts.

The Court below, without any analysis, concludes that the farmers here were "[l]ike" those in *Klamath.* 358 F.3d at 1145. It does not deal with the admitted fact that *Klamath*, unlike the case at bar, did not adjudicate reclamation contracts made by a district to supply water to farmers who had created it for that purpose.

The Court below notes that, under the approach suggested by *Restatement* Section 313(2) and followed in *Klamath*, it presumes that the farmers were merely incidental beneficiaries because their district is a "government" which contracts to benefit the "public." But it deals with none of the facts that distinguish the special relationship between a farmer and his or her irrigation district, on the one hand, and the general relationship between a citizen and his or her government, on the other. A special-purpose irrigation district cannot properly be so equated to a general-purpose government. *Salyer Land Co.*, 410 U.S. at 728-29; *Ball*, 451 U.S. at 366-70.[33]

Instead, the Ninth Circuit's approach is simply to parse two articles of the 1963 contract for a "clear intent" that the parties regarded farmers as intended beneficiaries of its price and quantity terms. It reads the two sections restrictively, giving no consideration to other articles of the contract, its recitals as to the irrigation purposes of the contract, the

[33] One who merely aspires to buy land in an irrigation district has constitutional standing to sue the Bureau for violation of reclamation law. *Bryant,* 447 U.S. at 366-68.

statutory backdrop against which it was made, the permits and other contracts relating to it, or the stipulated judgment which enforced it. In short, the Ninth Circuit, unlike the Federal Circuit, applies two general rules announced in the *Restatement* to two specific articles of the contract, ignoring the existential facts about the Bureau, the farmers, their district, the contract and property relations among them, and the economic forces underlying those relationships.

The federal government should honor its commercial contracts with private citizens. *Lynch,* 292 U.S. at 579; *Perry v. U.S.,* 294 U.S. 330, 352 (1935); *Winstar,* 518 U.S. at 883-85, 894 n. 38, 895 n. 39, 903 n. 51 (plurality), 912 (Breyer, J., concurring), 924 (Scalia, J., concurring). Furthermore, for every wrong there should be a remedy. *Marbury v. Madison,* 5 U.S. 137, 162-63 (1803).

Where a water district is unwilling or unable to sue the Bureau for its alleged breach of a reclamation contract, the farmers who are the third-party beneficiaries of that contract and suffer damage when it is breached should have standing to sue, as the Federal Circuit has long and properly held, but the Ninth Circuit now improperly refuses to hold.

CONCLUSION

For these reasons, petitioners respectfully request that the Court grant review.

Respectfully submitted,

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May 18, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 00-16922

FRANCIS A. ORFF; BROOKS FARMS II; BROOKS FARMS IV; BROOKS FARMS V; G.S. FARMS; FIVE-D WESTSIDE FARMS, INC.; R & S FARMING; CARDELLA RANCH; GRAMIS FAMILY FARMS II; EDWIN R. O'NEILL, BRO PARTNERSHIP; BTO PARTNERSHIP; EJC PARTNERSHIP; ERO PARTNERSHIP; JEO PARTNERSHIP; SLO PARTNERSHIP; TBO PARTNERSHIP; C.S. STEFANOPOULOS TRUST; ELENA STEFANOPOULOS TRUST; ESTATE OF HELEN STEFANOPOULOS; D.D. STEFANOPOULOS TRUST; PAGONA STEFANOPOULOS; SUMNER PECK RANCH, INC.; Y. STEPHEN PILIBOS; PILIBOSCHILDREN'S TRUST,
Plaintiffs-Appellants,

WESTLANDS WATER DISTRICT,
Plaintiff-Intervenor,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF RECLAMATION; FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF COMMERCE; NATIONAL MARINE FISHERIES SERVICE; RONALD H. BROWN, SECRETARY OF COMMERCE; BRUCE BABBITT, SECRETARY OF THE INTERIOR,
Defendants-Appellees,

NATURAL RESOURCES DEFENSE COUNCIL; UNITED ANGLERS OF CALIFORNIA; SAVE SAN FRANCISCO BAY ASSOCIATION; CALIFORNIA WATERFOWL ASSOCIATION; SIERRA CLUB; BAY INSTITUTE OF SAN FRANCISCO; ENVIRONMENTAL DEFENSE FUND; CALIFORNIA STRIPED BASS ASSOCIATION; TROUT UNLIMITED OF CALIFORNIA; SACRAMENTO RIVER COUNCIL; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS; THE WILDERNESS SOCIETY,
Defendants-Intervenors-Appellees.

Argued and Submitted Feb. 11, 2003
Filed Feb. 18, 2004

Before: NOONAN, THOMAS and CLIFTON, *Circuit Judges*.

CLIFTON, *Circuit Judge*:

This appeal poses the issue of whether sovereign immunity bars individual landowners and water users (collectively, "the farmers") of the Westlands Water District ("Westlands") from suing the United States for allegedly having violated a contract the United States entered into with Westlands for the delivery of water. The district court originally concluded that sovereign immunity had been waived and proceeded to rule on the merits of the farmers' claims. The court then changed its mind on reconsideration, ruling that sovereign immunity barred the farmers' claims. We affirm that ruling. We agree with the district court that sovereign immunity deprived it of jurisdiction to hear the farmers' claims. Because the district court lacked jurisdiction to entertain those claims, we vacate the district court's rulings on the merits of those claims.

I. BACKGROUND

This is another in a long line of cases involving the Central Valley Project (the "CVP"), the nation's largest federal water

management project. Westlands receives water from the San Luis Unit of the CVP pursuant to a 1963 contract (the "1963 contract") with the United States.[1] The validity and enforceability of the 1963 contract was upheld in 1986 pursuant to a stipulated judgment in Stipulated Judgment, *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, (E.D.Cal.) (No. CV 79-106-EDP) ("*Barcellos*"), which resolved litigation that arose out of the government's assertion in 1978 that the 1963 contract was invalid. The *Barcellos* judgment required the government to perform the 1963 contract.

In 1990, the Sacramento River winter-run chinook salmon was listed as a threatened species under the Endangered Species Act (the "ESA"), 16 U.S.C. §§ 1531-1545. In 1993, the delta smelt of the Sacramento-San Joaquin Delta was also designated as a threatened species. The National Marine Fisheries Service determined that both species were jeopardized by the continued operation of the CVP. In response, the Bureau of Reclamation (the "Bureau") reduced Westlands' allocation of CVP water for 1993 to fifty percent of its contractual supply. The Bureau made this reduction pursuant to the ESA, which required federal agencies to avoid jeopardizing threatened species, and pursuant to the Central Valley Project Improvement Act (the "CVPIA"), which sought to protect the requirements of fish and wildlife in the use of CVP water. *See generally O'Neill v. United States*, 50 F.3d 677, 680-82 (9th Cir.1995) (discussing the aforementioned events more thoroughly).

Landowners and water users within the Westlands district then brought suit in district court, claiming that the reduction violated the 1963 contract as upheld by *Barcellos*. The district court held that Article 11 of the 1963 contract freed the

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[1] A general background of the CVP and the San Luis Unit was recently set forth by this court in *Westlands Water Dist. v. United States*, 337 F.3d 1092, 1095-96 (9th Cir.2003).

government from liability for the reduction. *Barcellos & Wolfsen v. Westlands Water Dist.*, 849 F.Supp. 717, 721-23 (E.D.Cal.1993) ("*Barcellos III*"). We affirmed, holding that Article 11(a) of the Contract "unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate." *O'Neill*, 50 F.3d at 689. We noted, however, that the Westlands members could challenge the merits of the Bureau's compliance with the ESA and CVPIA in a separate case. *Id.*

Westlands instituted the present action in May 1993. The Natural Resources Defense Council ("NRDC") and the farmers subsequently intervened. In 1995, Westlands dismissed its complaint without prejudice. The farmers remained as plaintiffs and filed a second amended complaint.

On June 5, 1998, the district court filed an order that wiped out most of the farmers' claims. The court dismissed the statutory claims for lack of subject matter jurisdiction pursuant to the Tucker Act, although it noted that the farmers may be able to bring those claims in the Court of Federal Claims. The court rejected the farmers' contention that the reclamation statutes constituted contracts and dismissed those claims for lack of subject matter jurisdiction.

That left remaining: (1) the farmers' claim that the reduction violated appropriative water rights; (2) the farmers' claim that the reduction violated trust law; (3) the farmers' claim that certain CVPIA surcharges violated the 1963 contract and the Constitution; and (4) the farmers' claim that the reduction was in breach of the 1963 contract. With regard to the first two claims, the farmers asserted that the 1963 contract incorporated appropriative water rights and trust obligations. The farmers argued that all four of their remaining claims therefore arose under the 1963 contract, to which the government's waiver of sovereign immunity under 43 U.S.C. § 390uu allegedly applied. The court agreed with

the farmers that it had jurisdiction to consider these claims because the farmers were "a contracting entity" under § 390uu. But the court ruled against the farmers on the merits of the first three claims, granting summary judgment for the government. The farmers managed to keep their case alive when the court ruled that they had raised triable issues of fact with regard to the fourth claim.

Those issues would never be tried, however. On April 12, 2000, the court altered its ruling on sovereign immunity pursuant to a motion for reconsideration by the government. The court ruled that, in light of our decision in *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir.1999), the farmers were only incidental, not intended, third- party beneficiaries of the 1963 contract. As such, they were not "a contracting entity" under § 390uu toward whom the government had waived sovereign immunity. Finding no other basis for a waiver of sovereign immunity, the court entered final judgment for the government on August 1, 2000.

The farmers timely appealed. Though it had previously dismissed its claims as a plaintiff, Westlands returned to the litigation as an intervenor, out of concern that its rights could be affected. Both Westlands and the NRDC filed briefs in this appeal as intervenors.

II. SOVEREIGN IMMUNITY BARS THE FARMERS' SUIT

The government argues that the farmers' claims are barred by sovereign immunity. We review issues of sovereign immunity and subject matter jurisdiction *de novo*. *Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir.1999). "It is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir.1985). We strictly construe in favor of the government the scope of any waiver of sovereign

immunity. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999). Any claim for which sovereign immunity has not been waived must be dismissed for lack of jurisdiction. *Gilbert*, 756 F.2d at 1458.

As a preliminary matter, we reject the farmers' claim that the government's sovereign immunity defense is barred by issue and claim preclusion pursuant to the decision in *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 491 F.Supp. 263 (E.D.Cal.1980) ("*Barcellos I*"). For issue preclusion to apply, "the issues litigated must not be 'merely similar,' but must be 'identical.'" *Central Delta Water Agency v. United States*, 306 F.3d 938, 953 (9th Cir.2002) (citation omitted). In *Barcellos I*, the district court rejected the government's sovereign immunity defense on two alternate grounds. The first ground was that the *ultra vires* exception to sovereign immunity applied because the government had allegedly committed an *ultra vires* agency action. *Barcellos I*, 491 F.Supp. at 265-66. The second ground was that sovereign immunity had been waived pursuant to the McCarran Amendment, 43 U.S.C. § 666, because the relief sought fell under that amendment.[2] *Id.*, at 266-67.

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[2] The McCarran Amendment reads in pertinent part:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. . . .

43 U.S.C. § 666(a) (1986).

Neither ground applies in this case. The farmers do not allege that the government committed an *ultra vires* agency action. Nor does the McCarran Amendment apply. This is a private lawsuit for damages between the farmers and the government, which is not the type of suit contemplated by the McCarran Amendment:

> The McCarran Amendment provides that the United States is deemed to have waived its immunity in any suit for the adjudication of rights to the use of water of a river system or other source [(§ 666(a)(1))], or for the administration of such rights [(§ 666(a)(2))]. The McCarran Amendment, however, does not authorize private suits to decide priorities between the United States and particular claimants, only suits to adjudicate the rights of all claimants on a stream. *Dugan v. Rank*, 372 U.S. 609, 617-18, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963) (citation omitted).

Metro. Water Dist. of S. Cal. v. United States, 830 F.2d 139, 144 (9th Cir.1987), *aff'd by California v. United States*, 490 U.S. 920, 109 S.Ct. 2273, 104 L.Ed.2d 981 (1989) (*per curiam*); *see also United States v. Dist. Court In & For Water Div. No. 5, Colo.*, 401 U.S. 527, 529, 91 S.Ct. 1003, 28 L.Ed.2d 284 (1971) (The McCarran Amendment "does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants."). This is not a suit to adjudicate or administer the rights of all claimants on a stream.[3]

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[3] The McCarran amendment also consents to suits for "administration of such rights," 43 U.S.C. § 666(a)(2). To come within § 666(a)(2), a suit must seek to enforce or administer rights of the sort covered by § 666(a)(1), already adjudicated. *See United States v. Hennen*, 300 F.Supp. 256, 263 (D.Nev.1968). Though Orff (or a relative) might have had his *general* stream water rights considered and adjudicated in *Barcellos* and *Barcellos I*, the farmers do not point to *specific* rights adjudicated in either case that the reductions at issue violate. Rather, they are seeking to

We note that the farmers did not even plead jurisdiction under the McCarran Amendment in their second amended complaint; they pleaded only under § 390uu.

Because the issue in *Barcellos I* is not identical to the issue presented in this case, the government is not issue precluded from claiming sovereign immunity. Nor does claim preclusion apply. One requirement of claim preclusion is that "the prior litigation involved the same claim or cause of action as the later suit." *Central Delta Water Agency*, 306 F.3d at 952. In evaluating this requirement, the most important consideration is "'whether the two suits arise out of the same transactional nucleus of facts.'" *Id.* (citation omitted). "[W]hen considering whether a prior action involved the same 'nucleus of facts' for preclusion purposes, we must narrowly construe the scope of that earlier action." *Id.* at 953. As explained above, the facts the district court relied on to find a waiver of sovereign immunity in *Barcellos I* do not apply here. Additionally, this action arises out of the government's allocation of CVP water for 1993 based on designations of threatened species that occurred long after *Barcellos I* had been decided. As such, the nucleus of facts underlying this action differs from the nucleus of facts underlying *Barcellos I.*

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enforce rights they argue are implicitly incorporated in the contract. Adjudication of general water rights in the prior cases is therefore insufficient for a waiver of sovereign immunity under § 666(a)(2) in the case at bar. Moreover, finding otherwise and granting waiver under § 666(a)(2) in this case would still be counter to the holdings of *Metropolitan Water Dist.* and *Dugan*, which expressly limit the government's consent in waiving sovereign immunity under the McCarran Amendment to those cases that implicate "the rights of *all* claimants on a stream."

The farmers' suit may nevertheless proceed in district court if the § 390uu waiver of sovereign immunity applies. Section 390uu provides in its entirety:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights *of a contracting entity* and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated.

43 U.S.C. § 390uu (emphasis added). The farmers assert that they are intended third-party beneficiaries of the 1963 contract and therefore "a contracting entity" under § 390uu. Our holding in *Klamath* compels us to reject this argument.

The plaintiffs in *Klamath* were irrigators in the Klamath Basin. The California Oregon Power Company ("Copco") and its successor in interest, PacifiCorp, operated a dam (the "Dam") in the Klamath Basin pursuant to a 1956 contract with the United States. *Klamath*, 204 F.3d at 1209. It was undisputed that "the Dam was built to help the United States satisfy its contractual obligations to water users in the basin, including the Irrigators." *Id.* "Copco's interest related primarily to controlling the flow of water to the Copco-owned hydroelectric facilities downstream from the Dam." *Id.*

Just as the 1963 contract is subject to the requirements of subsequently-enacted statutes such as the ESA and the CVPIA, *see O'Neill*, 50 F.3d at 686, operation of the Dam in

Klamath was also subject to the requirements of such statutes, *see Klamath*, 204 F.3d at 1209. In 1997, the Bureau of Reclamation issued an interim operating plan for the Dam in response to the designation of certain fish species in the Klamath River and Klamath Basin as threatened or endangered, and in consideration of the rights of certain Indian tribes. *Id.* at 1209-10. The Bureau and PacifiCorp modified the 1956 contract to implement the interim plan, but did not include the irrigators in the negotiations leading to the modification. *Id.* at 1210. The irrigators sued for breach of the 1956 contract based on their alleged status as third- party beneficiaries. *Id.*

We began our analysis by observing that, "[b]efore a third party can recover under a contract, it must show that the contract was made for its direct benefit—that it is an intended beneficiary of the contract." *Id.* While "the intended beneficiary need not be specifically or individually identified in the contract," it must still "fall within a class clearly intended by the parties to benefit from the contract." *Id.* at 1211. We presumed the irrigators to be incidental, rather than intended, beneficiaries of the 1956 contract unless the contract evinced "a clear intent to the contrary":

> Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract *absent a clear intent to the contrary*. Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested.

Id. (emphasis added; internal citations and quotation marks omitted). We concluded after examining the plain language of the 1956 contract that the irrigators were not intended third-party beneficiaries: "The plain language of the Contract is sufficient to rebut the contention that the Irrigators are intended third-party beneficiaries. Neither Article 2 nor Article

6 illustrates an intention of Copco or the United States to grant the Irrigators enforceable rights." *Id.*

Like the irrigators in *Klamath*, the farmers in our case fail to satisfy the "clear intent" standard required to establish intended beneficiary status. The farmers rely on Articles 15 and 11(b) of the 1963 contract. To be sure, these provisions do make reference to third party water users, but neither provision evinces a clear intent to make the farmers intended beneficiaries. Though the opinion in *Klamath* did state that an explicit reference to a third party was not a *necessary* condition to finding that party to be an intended beneficiary, it in no way implied that an explicit reference was a *sufficient* condition to finding that party to be an intended beneficiary. Article 15 reads in pertinent part:

> Should any assessment or assessments required by the terms of this contract and levied by the District against any tract of land or water user in the District and necessary to meet the obligations of the District hereunder be judicially determined to be irregular or void . . ., then such tract shall have no right to any water furnished to the District pursuant to this contract, and no water made available by the United States pursuant thereto shall be furnished for the benefit of any such lands or water users, except upon the payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rate and upon the terms and conditions provided for herein is a prerequisite to the right to the use of water furnished to the District pursuant to this contract, and no irregularity in levying taxes or assessments by the Dis-

> trict nor lack of authority in the District, whether affecting the validity of District taxes or assessment or not, shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid by such water user.

We agree with the district court that "[r]ather than manifesting an intent to create enforcement rights in individual water users, [Article 15] focuses on the absolute requirement that users first pay assessments and charges to the Districts to obtain water. It is only the District, not the water users, that has directly enforceable rights to obtain water from the government under the 1963 contract." Mem. Op. & Order Re Federal Defs.' Mot. to Recons., *Orff v. United States*, at 12-13 (E.D.Cal.2000) (No. 93-5327).

Article 15's references to third party "water users" do not establish that the farmers possess enforceable rights against the government. Article 15 states that "Contracts, if any, between the *District and the water users* involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract." (emphasis added) This sentence, however, in no way delineates a contractual relationship between the farmers and the government. It only describes a potential contractual relationship between Westlands and the farmers. Article 15 also provides that "no irregularity in levying taxes or assessments ... shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid for by such water user." This only seems to reinforce the view that the farmers must satisfy certain conditions precedent before obtaining water from Westlands; whatever rights the farmers accordingly have under Article 15 are against Westlands, not the government.

Indeed, Article 15 similarly states that "the payment of charges at the rate and upon the terms and conditions provided for herein is *a prerequisite to the right to the use of water furnished to the District.*" (emphasis added). Article 15, while defining in part the farmers' rights to water as provided by Westlands, does not demonstrate "an intention . . . to grant [the farmers] enforceable rights" against the government.

The farmers' reliance on Article 11(b) is similarly unavailing. Article 11(b) provides in full:

> In the event that in any year there is delivered to the District by reason of any shortage or apportionment as provided in subdivision (a) of this article or any discontinuance or reduction of service as set forth in subdivision (d) of Article 9 hereof, less than the quantity of water which the District otherwise would be entitled to receive, there shall be made an adjustment on account of the amounts paid to the United States by the District for water for said year in a manner similar to that provided for in Article 7. To the extent of such deficiency, such adjustment shall constitute the sole remedy of the District or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein.

The farmers claim that the "anyone" referenced by Article 11(b) includes them. Article 11(b) does indicate that individuals that have a right "by, through, or under" Westlands to the water provided by the government have an "adjustment" remedy against the government where a shortage of water or discontinuation or reduction in service occurs. That said, Article 11(b) explicitly states that the adjustment remedy is a reduction "on account of the amounts paid to the United States" *by Westlands* pursuant to other provisions in the 1963 contract. Because only Westlands under the 1963 contract has direct contractual privity with the government and is obligated to pay it money, the contested language of Article 11(b)

can only sensibly refer to individuals or entities to whom Westlands has contractually *assigned* its rights and duties under the 1963 contract and who are now in contractual privity with the government. It cannot establish the inconsistent proposition that these same individuals or entities are intended third party beneficiaries of the contract.[4]

Article 15 and Article 11(b) merely show that the 1963 contract operates to the farmers' benefit and was entered into with the farmers "in mind." That by itself is not enough under *Klamath* to confer intended third-party beneficiary status on the farmers. *See Klamath*, 204 F.3d at 1212 ("Although the Contract operates to the Irrigators' benefit by impounding irrigation water, and was undoubtedly entered into with the Irrigators in mind, to allow them intended third party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the Contract."); *see also id.* ("[T]he recitation of constituencies whose interest bear on a government contract does not grant these incidental beneficiaries enforceable rights."). Because the 1963 contract does not "illustrate[ ] an intention of [Westlands] or the United States to grant[the farmers] enforceable rights," *id.* at 1211, the farmers do not qualify for the § 390uu waiver of sovereign immunity as intended third-party beneficiaries.[5]

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[4] The farmers were never contractually assigned rights under the contract by Westlands, hence their current attempt to define themselves as intended third party beneficiaries.

[5] Our conclusion here and our decision in *Klamath* may be at odds with *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed.Cir.1984). In that case, farmers belonging to an irrigation district in Washington alleged that the Bureau had breached a contractual obligation to estimate accurately the amount of water it expected to supply them. *Id.* at 1573. The Federal Circuit concluded that the farmers were intended third-party beneficiaries of the contract at issue. *Id.* at 1576. That court did not, however, examine any contract language. Instead, it based its conclusion on the fact that the farmers were beneficial users of the water who

Nor do the farmers qualify for the § 390uu waiver under recordable contracts between them and the government. Pursuant to the 1963 contract, the farmers entered into recordable contracts with the government in the late 1960s and early 1970s regarding the sale of, and the farmers' rights to receive water for, excess lands. Excess lands were lands owned by water users that exceeded the maximum acreage permitted to receive CVP water under federal reclamation law. The recordable contracts subjected the right to receive water for excess lands to the provisions of both the 1963 contract and each recordable contract. The recordable contracts also required the sale of excess lands within a ten-year period and set forth an appraisal procedure to determine sale prices.

The farmers allege that each recordable contract "fully incorporates" the 1963 contract, thereby entitling them to sue the government under § 390uu as contracting entities of the recordable contracts. We disagree. Far from "fully incorporating" the 1963 contract, Article 5 of the recordable contracts simply subjects the farmers' rights to receive CVP water to the provisions of the 1963 contract and of the recordable contract.[6] Each recordable contract directly incorporates only Articles 23, 24, and 25 of the 1963 contract, which relate to the provision of water to, and the valuation and sale of, excess lands. Yet the farmers are not attempting

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ultimately paid for it. *See id.* As noted above, the mere fact that the farmers benefit from the 1963 contract is not enough to confer intended-beneficiary status on them. Rather, the law in our circuit requires an examination of the precise language of the contract for a "clear intent" to rebut the presumption that the farmers are merely incidental beneficiaries. Because no such clear intent is present in the contract, we cannot confer intended beneficiary status on the farmers. To the extent that the Federal Circuit employs a different approach and reaches a different result, we respectfully disagree.

[6] Article 5 states in its entirety, "All rights of the Landowner to receive Project water for his excess land shall be subject to the provisions of the District Contract and this contract."

to enforce any of those provisions, or any other provision of the recordable contracts, in this lawsuit. Instead, they are suing for an alleged breach of the 1963 contract. The fact that the farmers are contracting entities to recordable contracts that reference the 1963 contract does not make the farmers intended beneficiaries of the 1963 contract or otherwise give them a right to enforce that contract.

The *Barcellos* judgment does not qualify the farmers for the § 390uu waiver of sovereign immunity, either. Paragraph 23 of that judgment expressly provides that the judgment shall not be considered a contract or an amendment for purposes of § 390uu: "Neither this Judgment nor the Stipulation for Compromise Settlement is a contract or an amendment to a contract with the United States as described in Section 203(a) of the 1982 Act." Thus, even though the farmers may be parties to the *Barcellos* judgment, that does not qualify them as "a contracting entity" for purposes of § 390uu.[7]

Finally, we reject the farmers' attempt to sue as trust beneficiaries. The farmers contend that Westlands acts as a trustee for them and that, because Westlands has failed to pursue a claim against the government, they may "step into the trustee's shoes" to sue. We disagree. Even if Westlands does act as a trustee for the landowners (an issue we do not decide), the farmers, as beneficiaries, have not met the requirements for suing in Westlands' shoes.

"[T]he beneficiary of a trust generally is not the real party in interest and may not sue in the name of the trust." *Saks v.*

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[7] The district court ruled that, even if paragraph 3 of the *Barcellos* judgment permits the farmers to bring this lawsuit, the suit may not be brought in district court because the farmers seek damages exceeding $10,000. *See* 28 U.S.C. § 1346(a)(2). The court noted that the farmers may be able to bring this suit in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491. As the farmers have not challenged this ruling on appeal, we do not consider it.

Damon Raike & Co., 7 Cal.App.4th 419, 8 Cal.Rptr.2d 869, 874-75 (1992). There is an exception to this rule, however. "[W]here a trustee cannot or will not enforce a valid cause of action that the trustee ought to bring against a third person, a trust beneficiary may seek judicial compulsion against the trustee. In order to prevent loss of or prejudice to a claim, the beneficiary may bring an action in equity joining the third person and the trustee. The beneficiary may also sue third persons who directly participated with the trustee in breaches of trust." *Id.* at 875 (internal citations omitted). The farmers have neither sought judicial compulsion against Westlands, nor alleged that the government "directly participated" with Westlands in any breach of trust. They have therefore failed to establish that they may sue in the shoes of Westlands.

In sum, the district court properly dismissed the farmers' claims for lack of jurisdiction on the ground that they were barred by sovereign immunity. The farmers do not qualify for the waiver of sovereign immunity under the McCarran Amendment because the McCarran Amendment does not apply to this suit for money damages. Nor do the farmers qualify for the waiver of sovereign immunity under § 390uu. The farmers are not intended third-party beneficiaries of the 1963 contract under *Klamath*, and neither the recordable contracts nor the *Barcellos* stipulated judgment makes them "a contracting entity" under § 390uu. Finally, the farmers have not met the requirements for suing in the shoes of Westlands as beneficiaries.

III. THE DISTRICT COURT'S RULINGS ON THE MERITS MUST BE VACATED

"The very purpose of the [sovereign immunity] doctrine is to prevent a judicial examination of the merits of the government's position." *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir.1987). Because the government never waived its immunity from suit, the district court never had jurisdiction to issue its rulings on the merits of the farmers'

appropriative water rights, trust, and surcharge claims. *See United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). This holds true despite the fact that the district court issued those rulings at a time when it had determined that sovereign immunity had been waived. *See Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17, 71 S.Ct. 534, 95 L.Ed. 702 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation. . . .").

We must therefore vacate as nullities the district court's rulings on the merits of the appropriative water rights, trust, and surcharge claims. As we stated in *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376 (9th Cir.1988), "If jurisdiction is lacking at the outset, the district court has 'no power to do anything with the case except dismiss.' . . . If jurisdiction was lacking, then the court's various orders . . . were nullities." *Id.* at 1380-81 (internal citations omitted); *accord Finn*, 341 U.S. at 18, 71 S.Ct. 534 (requiring a district court to vacate judgment after having determined that the district court lacked subject matter jurisdiction over the suit); *United States v. 51 Pieces of Real Prop., Roswell, N.M.*, 17 F.3d 1306, 1309 (10th Cir.1994) ("[A] judgment is void if the court that enters it lacks jurisdiction over . . . the subject matter of the action."); *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798, 804 n. 6 (2d Cir.1984) ("[A] judgment entered by a court lacking subject matter jurisdiction may not stand."); *Cupey Bajo Nursing Home, Inc. v. United States*, 23 Cl.Ct. 406, 412 (1991) ("It is well settled that a question relating to subject matter jurisdiction goes to the very heart of our power to hear a controversy, and any decision on the merits rendered in the absence of such authority would, of course, be a nullity."). The district court's rulings on the merits of the appropriative water rights, trust, and surcharge

claims shall not be binding in this or any other case. *See United States v. Troup*, 821 F.2d 194, 197 (3d Cir.1987) ("A lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; . . . [the] earlier case can be accorded no weight either as precedent or as law of the case.") (quoting *Ala. Hosp. Ass'n v. United States*, 228 Ct.Cl. 176, 656 F.2d 606 (1981)) (alterations in original).

We recognize that, at times, "jurisdiction is so intertwined with the merits that its resolution depends on the resolution of the merits." *Careau Group v. United Farm Workers*, 940 F.2d 1291, 1293 (9th Cir.1991). But that is not the case here. The determinations that § 390uu and the McCarran Amendment were inapplicable to the farmers, and that the farmers could not sue in the shoes of Westlands, depended in no way on the merits of the farmers' appropriative water rights, trust, or surcharge claims. Indeed, in determining today that the government has not waived sovereign immunity, we have had no need to explore the merits of those claims.

Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), relied on by the government and by the NRDC, compels no different result. In *Bell,* the complaint alleged federal question jurisdiction under the Constitution. *Id.* at 679, 66 S.Ct. 773. Because the complaint sought recovery directly under the Constitution, the Supreme Court held that the district court had jurisdiction over the suit. *Id.* at 681-82, 66 S.Ct. 773. The Supreme Court explained that the district court "must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy." *Id.* at 682, 66 S.Ct. 773. The Court instructed that if the district court in exercising its jurisdiction determined that the complaint failed to state a claim, then the case would have to be dismissed on the merits, not for lack of jurisdiction. *Id.* The core holding in *Bell* was "that the nonexistence of a cause of action was no proper basis for a

jurisdictional dismissal." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 96, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

Bell is inapposite because the jurisdictional defect in our case does not arise from "the nonexistence of a cause of action." It arises because the government has not waived its immunity against the farmers' claims. That defect is separate and apart from the merits of the claims that the district court ruled on. The sovereign immunity issue and the merits of the appropriative rights and trust claims are simply not intertwined, as the resolution of one does not depend on resolution of the other.

IV. CONCLUSION

In summary, we affirm the district court's conclusion that sovereign immunity deprived it of jurisdiction to hear the farmers' claims. Because the district court lacked jurisdiction to entertain those claims, we vacate the rulings previously made by the district court on the merits of those claims.

AFFIRMED IN PART, VACATED IN PART, all parties to bear their own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-93-5327 OWW SMS

FRANCIS A. ORFF, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,
Defendants.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Defendants-in-Intervention.

The Court, having heard and considered the cross-motions for summary judgment and all written authorities of the parties filed in this matter, as well as the oral arguments presented, final judgment is entered for Defendants and Environmental Intervenors as follows:

1. All issues that were not briefed for the August 21, 1997 summary judgment motions hearing are moot and have been withdrawn by Plaintiffs. *See* August 21, 1997 RT at 48:21-25 ("The issues we didn't brief we've conceded are moot and have withdrawn them."). The only issues briefed for the August 21, 1997 hearing were Plaintiffs': state appropriative water rights claims, *see* Doc. 562 at 1:22-24; trust claims, *see id.* at 2:10-22; federal Reclamation Law rights claims, *see id.* at 2:21-3:3; claims that the United States breached the 1963 Westlands Water District Contract and, if so, whether Plaintiffs were entitled to money damages. The June 5, 1998 Order addressed the first three issues as follows: summary judgment

was granted "to bar all Plaintiffs' state appropriative water rights claims," Doc. 588 at 48:19-21; summary judgment was granted to bar "all public and private trust claims," *id.* at 46:2-3; and Plaintiffs' non-contractual, statutory violation claims were dismissed without prejudice for lack of subject matter jurisdiction, *see id.* at 32:9-11, and summary judgment was granted as to any claims asserting the reclamation laws constitute contracts, *see id.* at 33:14-15. The only remaining claim was Plaintiffs' claim that the United States had breached the 1963 contract between Westlands and the United States.

2. In April 2000, the Court issue a "Memorandum Opinion and Order Re Federal Defendants' Motion to Reconsider." That Order found:

A. Plaintiffs are not intended third-party beneficiaries of the 1963 Contract between the United States and Westlands and the June 5, 1998 holding to the contrary was vacated. *See* Doc. 634.

B. Plaintiffs' money damages claims were dismissed for lack of subject matter jurisdiction, or in the alternative, transferred to the Court of Federal Claims. *See* Doc. 634.

C. Since April 2000, Plaintiffs have been given three opportunities to have the case transferred to the Court of Claims. Each time, they have objected by purporting to impose unilateral conditions on any transfer. The re-argument and objections by Plaintiffs are OVERRULED.

3. All claims have been resolved. JUDGMENT is entered in favor of Federal Defendants and Environmental Intervenors, and against Plaintiffs.

SO ORDERED.

DATED: August 10, 2000

/s/ Oliver W. Wanger
OLIVER W. WANGER
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-93-5327 OWW SMS

FRANCIS A. ORFF, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,
Defendants.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Defendants-in-Intervention.

MEMORANDUM OPINION AND ORDER
RE FEDERAL DEFENDANTS' MOTION
TO RECONSIDER

This matter is before the Court on the Federal Defendants' motion to reconsider.

I. INTRODUCTION

On June 5, 1998 the Court filed a memorandum decision regarding the parties' motions for clarification and reconsideration. A conforming order was filed August 14, 1998.

On January 22, 1999, Federal Defendants filed a motion to modify[1] the Decision on the grounds that Area I plaintiffs

[1] Federal Defendants' "Motion to Modify That Part of the Court's Memorandum Opinion and Order Holding That Plaintiffs Have Standing to Sue the Federal Defendants Under 43 U.S.C. 390uu With Regard to

lack standing to sue Federal Defendants under 43 U.S.C. § 390uu. The motion is construed as another motion for reconsideration in light of recently decided case law.

Environmental Intervenors filed a statement of non-opposition to Federal Defendants' motion February 4, 1999. Area I plaintiffs opposed the motion March 4, 1999.[2] The Federal Defendants filed a reply brief March 17, 1999.[3] The motion was heard March 29, 1999.

II. LEGAL STANDARD

Rule 60(b) permits reconsideration of a final judgment, order or proceeding of the district court on grounds of: 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence that would support grounds for a new trial under Rule 59; 3) fraud of an adverse party; 4) judgment is void; 5) judgment has been satisfied, released or discharged ; or 6) any other reason justifying relief from the operation of the judgment. FED. R. CIV. P. 60(b).

Reconsideration is generally appropriate 1) when there has been an intervening change of controlling law, 2) new evidence has come to light, or 3) when necessary to correct a clear error or prevent manifest injustice. *See School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993); *see also* L.R. 230 (k) (requirements for application for reconsideration). "A motion for reconsideration is not a vehicle to

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Claims Arising Under Contracts Between Westlands and the United States", filed January 22, 1999, is referred to and cited in this memorandum opinion as "Motion".

[2] Plaintiffs' Opposition to Federal Defendants' Motion to Modify, filed March 4, 1999, is referred to and cited in this memorandum opinion as "Opposition".

[3] Federal Defendants' Reply Memorandum In Support of Motion to Modify, filed March 17, 1999, is referred to and cited in this memorandum opinion as "Reply".

reargue a motion or to present evidence which should have been raised before." *Bermingham v. Sony Corp. of America*, 820 F. Supp. 834, 856 (D.N.J. 1992), aff'd, 37 F.3d 1485 (3rd Cir. 1994). "A party seeking reconsideration must show more than a disagreement with the Court's decision. . . . [R]ecapitulation of the cases and arguments considered by the Court before rendering its original decision fails to carry the moving party's burden." *Id.* To succeed, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. *See Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F.Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds*, 828 F.2d 514 (9th Cir. 1987).

"Clause 60(b)(6) is residual and 'must be read as being exclusive of the preceding clauses.'" *LaFarge Conseils et Etudes, S.A. v. Kaiser Cement*, 791 F.2d 1334, 1338 (9th Cir. 1986) (quoting *Corex Corp. v. United States*, 638 F.2d 119, 121 (9th Cir. 1981)). Rule 60(b)(6) "is reserved for 'extraordinary circumstances.'" *Id.*

III. BACKGROUND

Westlands Water District, San Benito County Water District, San Luis Water District, and Panoche Water District filed this action May 17, 1993. They sought injunctive relief against Federal Defendants, alleging that several actions taken by Federal Defendants violated the Central Valley Project Improvement Act ("CVPIA") and the Endangered Species Act ("ESA"). Various groups intervened in the action, including Area I Plaintiffs in October 1993. (Doc. 51)

After two years of litigation, on September 6, 1995, Westlands, et al., moved to dismiss the case without prejudice. (Doc. 442) The motion to dismiss was granted and Area I Plaintiffs were given leave to file an amended complaint. (Doc. 464)

On November 14, 1995, the Area I Intervenors filed a "Second Amended Complaint" in which they allege the Court continues to have jurisdiction over the action under 43 U.S.C. § 390uu. (2d Am. Compl. ¶1, Doc. 465) They filed two motions for summary judgment on January 11, 1996. The first was for water year 1993-94 (Doc. 484) and the second was for water year 1994-95. (Doc. 485) The Court denied these motions April 24, 1997. (Doc. 548)

On May 30, 1997, the following three parties moved for reconsideration of that order: Federal Defendants (Doc. 558), Environmental Intervenors (Doc. 560), and Plaintiff Francis Orff (Doc. 562). These motions were addressed in an Order dated June 5, 1998. The Court held that Area I Plaintiffs are "intended third party beneficiaries with standing to litigate Westlands' contractual rights" (Mem. & Order at 18:3-5), and that the language of section 390uu is broad enough to allow money damages. (Mem. & Order at 23-24)

On January 22, 1999, Federal Defendants moved to modify the June 5, 1998 holding. (Doc. 613) They raise two issues. First, they argue that section 390uu does not give Area I Plaintiffs standing to sue. Second, they argue the Court erred when it allowed Area I Plaintiffs' claim for money damages in excess of $10,000.00 to remain in district court. Environmental Intervenors filed a statement of non-opposition to Federal Defendants' motion February 4, 1999. (Doc. 618) Area I Plaintiffs opposed the motion March 4, 1999 (Doc. 623) and Federal Defendants replied March 17, 1999. (Doc. 625)

On September 9, 1999, the Ninth Circuit decided *Klamath Water Users v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), which directly addresses the third-party beneficiary status of irrigators in the context of a contract between the United States Bureau of Reclamation and a utility. The Federal Defendants also refer to a District Court decision which also treats standing under § 390uu. *See State of Wyoming, et al. v.*

United States, 933 F.Supp. 1030, 1038 (D. Wyo. 1996). Given the new Ninth Circuit case law, reconsideration of the third-party beneficiary issue is appropriate.

IV. DISCUSSION

Federal Defendants challenge 1) the Court's conclusion that Area I Plaintiffs have standing to sue the United States under 43 U.S.C. § 390uu (Br. at 4), and 2) the Court's holding that Area I Plaintiffs can seek monetary damages for more than $10,000.00 in the district court under 43 U.S.C. § 390uu. (Br. at 15)

A. STANDING

1. Third-Party Beneficiary Standing

Area I Plaintiffs allege they have standing to sue under 43 U.S.C. § 390uu, which reads:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated.

43 U.S.C. § 390uu, The June 5, 1998 Order found Area I Plaintiffs to be "contracting entities" as defined by the statute because Area I Plaintiffs "are intended third party beneficiaries [of the contract between the United States and Westlands], "because their lands "are burdened by perfor-

mance obligations of the water service contract, including payment and acreage limitations." (Doc. 588 at 18:1-5)

It has been conceded that the Orff Plaintiffs are third-party beneficiaries. The 1986 Judgment entered by stipulation of the parties, including the United States, settled disputes under the 1963 contract. Paragraph 4.2 specifies that the 1963 contract was entered into for the benefit of Areas IA and IB and the lands therein. *See Barcellos and Wolfsen, Inc. v. Westlands Water District*, No. CV-79-106, (E.D. Cal. Dec. 30, 1986) (Judgment ¶ 4.2) ; *see also Barcellos and Wolfsen v. Westlands Water Dist.*, 849 F. Supp. 717, 720 (E.D. Cal. 1993) (listing among undisputed facts: "Movants are third party beneficiaries of the 1963 contract."); *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 731 (E.D. Cal. 1993) ("Both Westlands and Plaintiffs agree that Plaintiffs are third-party beneficiaries to the 1963 and 1965 contracts between the United States and Westlands."). The government was a party to the judgment and has not, until now, moved for relief from the terms of the judgment. Nonetheless, "a recitation of constituencies whose interest bear on a government contract does not grant these incidental beneficiaries enforceable rights." *Klamath*, 204 F.3d at 1212.

Under the law of contracts, there are two types of third-party beneficiaries: intended and incidental. *See* RESTATEMENT (SECOND) CONTRACTS § 302. An incidental beneficiary has no legal right to enforce the contract. *See A.T. Kearney, Inc. v. International Bus. Machs.* Corp., 73 F.3d 238, 242 (9th Cir.1995). An intended beneficiary, however, does, *See Klamath*, 204 F.3d at 1211.

The June 5, 1998 Memorandum and Order found the burden on Plaintiffs' lands, namely the acreage limitation on ownership and District members' covenants to satisfy District payment obligations under the 1963 contract, evinced the requisite specific intent to make the Area I landowners

intended beneficiaries. *Klamath*, however, emphasizes the need for closer scrutiny of the contract language.

a. *Klamath Water Users Protective Ass'n v. Patterson*

Klamath held: "[t] o sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Klamath, 204* F.3d at *1211 (citing Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997)).[4] Klamath applies the rule that "government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different interpretation is manifested. "*Id.* (citing RESTATEMENT (SECOND) CONTRACTS § 313(2))

("Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary."). Each contract provision must be examined to determine third-party standing.

In *Klamath*, the first contract provision at issue read:

> Copco shall operate and maintain for a period of fifty (50) years from the effective date hereof . . . Link River Dam, hereby constructed by Copco and transferred to the United States pursuant to the agreement of February 24, 1917. Copco may regulate the water level of Upper Klamath Lake between the elevations 4143.3 and 4137 . . . Provided, that the Contracting Officer from time to time may specify a higher minimum elevation than 4137 if in his opinion such must be maintained in

[4] Only intended third-party beneficiaries to a contract have standing sue on the contract. *See Klamath*, 204 F.3d at 1210. "One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him or her." *Id.* (citing RESTATEMENT (SECOND) CONTRACTS § 302(1) (b) cmt. d).

> order to protect the irrigation and reclamation requirements of Project Land. . . .

Id. The irrigators argued that this provision only allowed Copco to reduce the Lake's minimum elevation level "in order to protect the irrigation and reclamation requirements of Project Land," and such intended protection of Project land necessarily identified water user-landowners as expressly intended beneficiaries. *Id.* at 1212. The appeals court disagreed: "This sentence, however, does not manifest an intention to give third-party beneficiary rights to the Irrigators; rather, it grants discretion to the United States, through the person of the Contracting Officer, to enforce the Contract by taking control of the Dam." *Id.*

The second Klamath provision read:

> Nothing in this agreement shall curtail or in anywise be construed as curtailing the rights of the United States to Klamath Water or to the lands along or under the margin of Upper Klamath Lake. No Klamath Water shall be used by Copco when it may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land: Provided, That nothing in this agreement shall curtail or interfere with the water rights of Copco having a priority earlier than May 19, 1905. . . .

Id. at 1211. Irrigators contended that language that Copco may not use water "when it may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land," expressed the intent to give irrigators directly enforceable rights to protect their contract right to water. *Id.* The Ninth Circuit found: "This phrase, however, simply preserves the United States' ultimate control over the Dam and its

operations. It does not confer rights on the Irrigators." *Id.* The decision confirmed the United States' prior right to Klamath water for any purpose, including irrigation under the federal water service contracts.

b. *Plaintiffs claims re the 1963 Contract*

Here, Plaintiffs claim Articles 14, 15, and 16 of the 1963 contract manifest the mutual intent of the Bureau and Westlands to make water-user landowners intended third-party beneficiaries. (Pl. Opp. at 3:16-19) Article 14 reads:

> The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District. The lands which may be charged with any taxes or assessments under this contract are hereby designated and described as all the lands in the District.

This provision does not refer to any enforcement rights of any water user. Rather, it describes the applicable payment obligation by the Districts to the United States and states that all lands in the District are burdened by and subject to assessment and tax by the Districts. The Districts are responsible to pay any sum due the Bureau under the contract, even if individual water users are in default in payment to the Districts of users' taxes or assessments. The fact that landowners' lands within the District are burdened by such taxes or assessments does not, of itself, provide landowners a direct right to sue to enforce the District's right to water service. Article 14 does not mention water users or an intent to create enforcement rights in water users under the contract. Instead, it emphasizes the payment obligation of the District for all charges due the United States under the contract.

Article 15 reads:

> Should any assessment or assessments required by the terms of this contract and levied by the District against

any tract of land or water user in the District and necessary to meet the obligations of the District hereunder be judicially determined to be irregular or void . . . then such tract shall have no right to any water furnished to the District pursuant to this contract, and no water made available by the United States pursuant thereto shall be furnished for the benefit of any such lands or water users, except upon the payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rate and upon the terms and conditions provided for herein is a prerequisite to the right to the use of water furnished to the District pursuant to this contract, and no irregularity in levying taxes or assessments by the District nor lack of authority in the District, whether affecting the validity of District taxes or assessment or not, shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid by such water user.

This provision references water users with respect to four subjects. First, unless a landowner pays any assessment or toll charged, water will not be made available by the District. Second, any contract between the District and a water user must contain a provision making that water-user/District water-service contract subject to the terms of the 1963 contract. Third, "payment (by the water user] of charges . . . is a prerequisite to the right to the use of water." Fourth, if there is an irregularity in the levying of taxes or assessments, or if the District acts beyond its authority, water users cannot "demand" water from the District unless they have paid all

charges imposed by the District. The last sentence does not provide a water user the right to directly demand water from the United States under the 1963 contract, rather, it creates a condition precedent to any water user's right to demand water from the District under the 1963 contract; i.e., payment of any charges at the rates and on the terms established by the District for water service under the 1963 contract. The provision defines absolute payment obligations for water users, but does not mention any direct enforcement right in water users against the United States. Rather than manifesting an intent to create enforcement rights in individual water users, the paragraph focuses on the absolute requirement that users first pay assessments and charges to the Districts to obtain water. It is only the District, not the water users, that has directly enforceable rights to obtain water from the government under the 1963 contract.

Article 16 reads:

> The District shall cause to be levied and collected all necessary taxes and assessments and shall use all of the authority and resources of the District to make in full all payments to be made pursuant to this contract on or before the date such payments become due and to meet its other obligations under this contract. The District may, either or both, require the payment of toll charges or levy assessments for such water supplied hereunder.

As with Article 14, Article 16 does not reference water users; rather, it describes the District's authority to charge toll (tax) water users or levy assessments to pay for water provided under District/water-user contracts to enable the District to meet all District payment obligations to the United States under the contract.

Closer scrutiny of all the 1963 contract terms reveals no language that expresses even ambiguous intent to create in water users direct enforcement rights against the United States. Plaintiffs are incidental, not intended, third-party

beneficiaries of the 1963 contract. Further support for this conclusion, that the 1963 contract did not grant Plaintiffs intended third beneficiary status, is Paragraph 4.2 of the 1986 Judgment that specifically vests enforcement rights in the District: "The District will enforce the prior rights of said areas to the benefits of said Contract and acknowledges that water users in Areas 2A and 2B may purchase water under the 1963 Contract not purchased by water users in Areas IA and 1B as provided in this Judgment. "Paragraph 4 (emphasis added). Although Area 2A and 2B water users are granted residuary water-purchase rights to District water by the 1963 contract and 1986 Judgment, no enforcement rights in such water against the United States are specified.

Further analysis shows that the 1963 contract does not provide Area I Plaintiffs standing to sue the United States for breach of that contract because they are neither contracting parties or intended third party beneficiaries.

c. *Standing Under the Recordable Contracts*

Area I Plaintiffs argue that even if the Court finds they are not intended third-party beneficiaries of the 1963 contract, they nonetheless have standing to sue under the recordable contracts. (P1. Opp. at 8:8-9:13) Plaintiffs are parties or successors to recordable contracts with the United States signed in the late 1960s and early 1970s. (P1. Opp. at 8:8-9). In substance, the recordable contracts address landowner rights with to receive CVP water for their "excess lands" (land owned by a water user which exceeds the maximum acreage permitted to receive CVP Project water under Federal reclamation law). These contracts provide that the right of any landowner to receive CVP14 Project water for excess lands is subject to the provisions of both the 1963 Contract and each recordable contract, and require sale of excess lands within a 10 year period at prices to be determined by the appraisal procedure set forth in the recordable contracts. An abatement provision exists in Paragraph 13, excluding any

year or years from the 10 year period for sale, in which water or service from the CVP may not be available to the land involved through no fault of the District or the Landowner. All recordable contracts have been performed.

Plaintiffs argue they have standing to enforce the terms of the recordable contracts as they are "contracting" entities with the United States to these contracts executed under federal reclamation law. The Federal Circuit has held that section 390uu covers all reclamation contracts, "not just repayment or water service contracts." *City of Tacoma, Washington v. Richardson*, 163 F.3d 1337, 1340 (Fed. Cir. 1998). Here, however, Plaintiffs do not claim breach of any rights under the recordable contracts; rather, they seek to enforce the 1963 contract.

Plaintiffs raise various arguments as to why they should be allowed to extrapolate standing from the recordable contracts to standing under the 1963 contract. First, they note that "[e]ach recordable contract recites that it is made 'in consideration of the direct and indirect benefits to be derived under' the 1963 contract," the 1963 contract is "being 'implemented' by the recordable contract," and the "recordable contract serves 'as an inducement to the United States to make water and distribution facilities available." (P1. Opp. at 8:9-14) Although all three of these statements reference the 1963 contract, none grants Plaintiffs the right to enforce the 1963 contract.

Second, Plaintiffs claim Article 5 of each recordable contract gives them standing. Article 5 reads, in pertinent part:

> All rights of the Landowner to receive Project water for his excess land shall be subject to the provisions of the District Contract and this contract.

Recordable Contract, art. 5. Article 5 does not address standing to enforce the 1963 Contract, it simply makes any right of a landowner to receive CVP water for excess land subject to both the 1963 contract and the recordable contract.

Third, Plaintiffs rely on Article 9 in each recordable contract, which provides:

> When any of the excess land covered by this agreement shall have been transferred in accordance with the provisions hereof to a person who, as the owner of such land, qualifies as a nonexcess Landowner under the District Contract, the land so transferred shall thereupon be subject to and governed by the terms and provisions of said District Contract applicable to nonexcess lands.

Recordable Contract, art. 9. No enforcement right for the 1963 contract is granted by art. 9 to a transferee of excess land, nor has any plaintiff alleged such transferee status.

Plaintiffs also contend that "a breach by the government of the 1963 contract is ipso facto a breach of each recordable contract." (Opp. at 8:22-23) This argument does not follow. Although any recordable contract holder or transferee of excess land is subject to the 1963 contract, terms applicable to nonexcess lands, the recordable contracts do not fully incorporate by reference the entire 1963 contract between the Bureau and Westlands. Paragraph 4 of the recordable contracts incorporates specifically by reference, only Articles 23, 24, and 25 of the District (1963) Contract. Articles 23, 24, and 25 of the 1963 Contract refer only to conditions of provision of Project water to excess lands owned by District landowners. The recordable contracts also only refer to excess lands. Plaintiffs do not allege they still own excess lands entitled to CVP water nor have they alleged any breach with respect to excess lands under the recordable contracts. The recordable contracts do not grant Plaintiffs standing to sue under the 1963 contract.

Plaintiffs do not explain how, if no direct enforcement rights against the United States exist in water users under the 1963 contract, the recordable contracts, which do not contain direct enforcement rights in the 1963 contract, could incorporate such non-existent enforcement rights. Plaintiffs refer to

no other provision of the recordable contracts to support the contention that those contracts confer direct enforcement rights or intended third-party beneficiary status on them.

d. *Standing Under the 1986 Barcellos Judgment*

Standing to enforce the 1986 judicially supervised settlement of the dispute over the 1963 contract, which incorporates the 1963 contract and its progeny, has been conferred on some of the Plaintiffs. The 1986 Judgment states "the District and the United States shall perform the 1963 *Contract." Barcellos and Wolfsen, Inc. v. Westlands Water District*, No. CV-79-106, ¶ 4.1 (E.D. Cal. Dec. 30, 1986). Paragraph 3 of the judgment provides: "[a] party may obtain relief from a violation of this Judgment only by (a) the filing of a new action, or (b) the filing of a motion in these present actions." *Id.* ¶ 3 at 10:13-15. "The parties entitled to file such a motion shall be limited to the Area representatives provided for in Paragraph 22." *Id.* ¶ 3 at 11:4-7. Under the Judgment, the representatives of Area I initially were "Boston Ranch Company, Edwin O'Neill, Frank Orff, Stephen Pilibos and Fabry Farms." *Id.* ¶ 22.2 at 54:3-5. This suit is a "new" action and the Second Amended Complaint was brought by, *inter alia*, Francis Orff, Edwin O'Neill, and Stephen Pilibos. (Doc. 465 at 1) Federal Defendants do not argue that these representatives no longer have such authority and standing under the judgment to enforce its terms. Orff, O'Neill, and Pilibos are proper party plaintiffs. Whether they can maintain a suit for money damages under the *Barcellos* Judgment requires further analysis.

The court's earlier analysis found standing in the Area I Plaintiffs to maintain this suit under the authority of Paragraph 3, Enforcement of Judgment:

> A party may obtain relief from a violation of this judgment only by (a) the filing of a new action, or (b) the filing of a motion in these present actions. . . . Provided, that any other appropriate relief may be

> obtained against the Federal parties by the filing of a new action for violation of . . . (b) any contract or other right or obligation arising independently of this Judgment, notwithstanding that (i) it is required to be performed by this Judgment, (ii) its future creation is anticipated or encouraged by this Judgment, or (iii) it is otherwise a subject of this Judgment.

This language, which authorizes a new action against the Federal parties for violation of "any contract or other right or obligation arising independently of this Judgment for any other appropriate relief "facially authorizes maintenance of this lawsuit which claims to redress a violation of the terms of "this [1986] Judgment" arising from a violation of any contract [the 1963 contract] or other right or obligation arising independently of this Judgment.

Even if it is assumed, *arguendo*, that Paragraph 3 of the 1986 Judgment confers standing, by interpreting this lawsuit as "a new action for violation of . . . any contract or other right or obligation arising independently of this Judgment for relief from a violation [of the 1986 Judgment]" the issue of whether a suit for money damages can be maintained in light of the Tucker Act requirements still must be analyzed.

B. TUCKER ACT JURISDICTION.

Although the 1986 Judgment is a contract between Area I Plaintiffs and the United States, the agreement does not necessarily confer the right to sue for damages in district court. The June 5, 1998 Memorandum and Order found subject matter jurisdiction under 42 U.S.C. § 390uu, citing *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 746-47 (E.D. Cal. 1993), which held: "Section 390uu displaces the Tucker Act in its waiver of sovereign immunity and allows the district court to hear Area I Plaintiffs' claims for money damages." (Mem. & Ord. at 23:23-24:11) A separate provision-by-provision analysis of

whether section 390uu applies to the 1986 Judgment was not undertaken. The motion to reconsider subject matter jurisdiction over contract claims for damages requires such an analysis.

1. Effect of Paragraph 23 of the Judgment.

The 1986 Judgment evinces an express intent by both parties to render section 390uu inapplicable to suits to enforce its terms. The parties explicitly stipulated in paragraph 23:

> Neither this Judgment nor the Stipulation for Compromise Settlement is a contract or an amendment to a contract with the United States as described in Section 203(a) of the 1982 Act.

See Barcellos and Wolfsen, Inc. v. Westlands Water District, No. CV-79-106, ¶ 23 (E.D. Cal. Dec. 30, 1986) (judgment). Section 203(a) of the 1982 Act is codified at 43 U.S.C. § 390cc, and reads:

> The provisions of this subchapter shall be applicable to any district which—
>
> (1) enters into a contract with the Secretary subsequent to October 12, 1982;
>
> (2) enters into any amendment of its contract with the Secretary subsequent to October 12, 1982, which enables the district to receive supplemental or additional benefits; or
>
> (3) which amends its contract for the purpose of conforming to the provisions of this subchapter.

43 U.S.C. S 390cc(a). Area I Plaintiffs cannot invoke section 390uu to enforce the.1986 Judgment because Paragraph 23 of that Judgment stipulates the Judgment is not a "390uu contract." The ability to sue for money damages in the district court must come from another source.

2. Waiver of Sovereign Immunity Independent of § 390uu.

Primary jurisdiction over claims against the United States for breach of contract is vested in the claims court under the Tucker Act, which waives the government's sovereign immunity:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a) (1) To invoke the Tucker Act, a plaintiff seeking monetary damages must "point to a money-mandating constitutional provision, statute, regulation, or contract with the United States affording it a right to money damages." *Terran ex rel. Terran v. Secretary of Health and Human Serv.*, 195 F 3 d 1302, 1309 (Fed. Cir. 1999). If a plaintiff can point to such a "money-mandating" provision, and if the damage amount does not exceed $10,000, federal district courts and the Court of Federal Claims have concurrent jurisdiction. *See* 28 U.S.C. § 1346(a)(2). Here, Area I Plaintiffs seek, *inter alia,* in excess of $16,000,000 for the 1993-94 water year and in excess of $16,000,000 for the 1994-95 water year for breach of contract monetary damages. (Doc. 465 at 50:22-24) In general, only the Federal Court of Claims has jurisdiction for money damages in the amounts sought by Area I Plaintiffs.

There is, however, one exception to this rule. A contract claim for money damages may be asserted against the United States in a district court "if there is an independent waiver of sovereign immunity outside the Tucker Act." *Presidential Gardens Assocs. v. United States of America*, 175 F.3d 132, 141 n.2 (2d Cir. 1999). Area I Plaintiffs argue that such an independent waiver exists in paragraph 3 of the 1986 judg-

ment' because it "explicitly allows Area I farmers to sue the government for 'any other appropriate relief' for breach of the 1963 contract." (Opp. at 9 n.10) Paragraph 3, entitled, "Enforcement of Judgment," reads:

> A party may obtain relief from a violation of this Judgment only by (a) the filing of a new action, or (b) the filing of a motion in these present actions. Either of these proceedings against the Federal parties shall, except as otherwise specifically limited by Paragraphs 6.1, 12.1.1, 12.1.2, and 12.3 of this Judgment, be for the sole purpose of seeking an order directing Federal parties to perform in accordance with the express terms of this Judgment; provided, that any other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of (a) Paragraph 5 below or (b) any contract or other right or obligation arising independently of this Judgment, notwithstanding that (i) it is required to be performed by this Judgment, (ii) its future creation is anticipated or encouraged by this judgment, or (iii) it is otherwise a subject of this judgment.

Any party who files an enforcement motion in the *Barcellos* case or a new action to enforce that Judgment, is limited to the remedies specified by paragraph three. *See* Judgment 1 3 ("The parties shall not seek judicial enforcement of this Judgment in any other manner than described above."). Analysis of Paragraph 3's language is required.

Paragraph 6.1 mandates that the Federal Parties develop, adopt, and submit a Drainage Plan for Drainage Service Facilities. (Judgment ¶ 6.1) Remedies available for an alleged breach of this paragraph "shall be strictly limited to (a) the release to the District of the money then deposited in the Drainage Trust Fund, plus accumulated interest . . . and (b) the revival of any claim against the United States of the right to drainage service." (Judgment ¶ 6.1) A separate lawsuit addresses drainage claims under paragraph 6.1.

Paragraph 12.1.1 requires that the Federal Parties "enter into a long-term [water service] contract under Section 9(e) of the 1939 Act on behalf of the United States with an improvement district of the District encompassing all of the territory described in paragraph 11.1 above, for the firm annual delivery of the amounts of Central Valley Project water referred to in Paragraph 5 . . . ." (Judgment 1 12.1.1) The available remedies "to a party for breach of this paragraph 12.1.1 by the Federal Parties" are limited to: "(1) the revival of any claim otherwise preserved pursuant to Paragraph 14.1.1, below, or (2) the bringing of a new action pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*"(Judgment 1 12.1.1)

Paragraph 14.1.1 is one of the claims for which the right to judicial relief in another action is preserved, *see* Judgment 1 14.1, and provides:

> Any claim of (a) a long-term right to the water service provided for in Paragraph 5 above at an agricultural water service rate of $7.50 per acre foot, and (b) if such a right is held not to exist, a right to recover the costs of operation and maintenance of the Pleasant Valley (Coalinga) Canal and Pumping Plant incurred by the District; provided, that such claims may be asserted only if the Federal Parties do not offer the District or an improvement district of the District encompassing Areas 2A and 2B a contract as described in Paragraph 12.1.1 above within a reasonable time prior to the expiration of the term of provisional water service provided for in Paragraph 5.2.4 above.

This language does not support a claim for money damages[5] for failure to provide water. Nor does the Administrative Procedure Act-("APA"), which does waive

[5] It has been the subject of prior litigation. *See Barcellos v. Westlands Water Dist.*, 899 F.2d 814 (9th Cir. 1990).

the United States' sovereign immunity, but not as to money damages. *See* 5 U.S.C. § 702.

Paragraph 12.1.2 provides:

> the Federal Parties will make a good faith effort to construct water distribution and collector drainage facilities needed in the District in addition to those constructed under the 1965 Contract; Provided, that the sole remedy available to party for an alleged breach of this Paragraph 12.1.2 by the Federal Parties shall be limited to pursuing a claim as described in Paragraph 14.1.8 below.

Judgment ¶ 12.1.2. Paragraph 14.1.8 is one of the claims not affected by the 1986 Judgment, *see* Paragraph 14.1, and provides:

> Any claim of a party against the United States of a legal right to have additional water distribution or collector drainage facilities constructed within the District in addition to those constructed pursuant to the 1965 Contract; provided, that such claim may be asserted only in the event that the Federal Parties fail to perform in accordance with the terms of Paragraph 12.1.2 above, and not otherwise.

Judgment ¶ 14.1.8. These paragraphs only provide a remedy for failure to construct water distribution or collection drainage facilities and are the subject of a separate lawsuit. See *Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 2000). There is no mention of money damages.

Paragraph 12.3 provides:

> At such time as additional Central Valley Project water becomes available for long-term contracting, the Federal Parties . . . shall make a good faith effort to provide for delivery of an additional annual supplemental water supply to an improvement district.

Under Paragraph 12.3, legal action available in the event of a breach by the Federal Parties is "the bringing of a new action

pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*." ¶ 12.3. The APA does not allow for money damages.

The remaining remedy found in Paragraph 3, relied upon by Plaintiffs, provides, in part:

> *any other appropriate relief* may be obtained against the Federal parties by filing a new action for violation of (a) Paragraph 5 below or (b) any contract or other right or obligation arising independently of this Judgment notwithstanding that (i) it is required to be performed by this judgment, (ii) its future creation is anticipated or encouraged by this judgment; or (iii) it is otherwise a subject of this Judgment.

(Judgment ¶ 3, emphasis added) Paragraph five discusses provisional water service to the District. *See* Judgment ¶ 5. It does not mention money damages. Subsection (b) refers to "any contract or other right arising independently of this Judgment notwithstanding that "such right is provided for, anticipated or encouraged, or is otherwise a subject of the Judgment. Area I Plaintiffs focus on the phrase "any other appropriate relief" and argue this subsection (b) is broad enough to support a claim for money damages for breach of the 1963 contract. *See* Opp. at 9 n.10. Because ¶ 23 removes the Judgment from § 390uu waiver of sovereign immunity, money damages are not "appropriate relief." This contention fails to address additional issues.

Assuming, *arguendo*, Paragraph 3 is broad enough to provide Plaintiffs standing to sue, the 1986 Judgment itself is not a 390uu contract, and cannot invoke 390uu's waiver of sovereign immunity. The 1963 contract has been analyzed above and found not to be a contract under § 390uu as to Area I plaintiffs.

Whether there is a waiver of sovereign immunity and, if so, whether money damages is an available remedy, are "two

'analytically distinct' inquiries." *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484 (1994). "It is a well-settled principle that the federal government's sovereign immunity may only be waived by Congressional enactment." *Presidential Gardens*, 175 F.3d at 140. Here, there is no evidence that Congress adopted a legislative enactment to independently authorize or ratify the 1986 Judgment. Rather, the Judgment is a contract between the Department of Interior and the other signatories. Agency officials do not have the power to waive the nation's sovereign immunity. *See United States v. Mitchell*, 463 U.S. 206, 215-16 (1983) ("[N] o contracting officer or other official is empowered to consent to suit against the United States.").

Even assuming, arguendo, Subsection (b) of paragraph 3 is as broad a waiver of sovereign immunity as Plaintiffs contend, "[a] claim for damages against a federal agency is barred by sovereign immunity unless Congress has consented to suit." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1460 n.6 (9th Cir. 1985). Since Congress did not enact legislation to authorize the 1986 Judgment and consent to suit, the requirement for Congressional action waiving sovereign immunity has not been met. Area I Plaintiffs' claims for money damages cannot be maintained in this Court. Rather, if maintainable, it is only maintainable by Area I parties in the Court of Claims.

V. CONCLUSION

The June 5, 1998 holding that Area I Plaintiffs are intended third-party beneficiaries is VACATED. Under *Klamath*, Area I Plaintiffs are not contracting parties or intended third-party beneficiaries of the 1963 Contract. Even if Plaintiffs have 390uu standing under the recordable contracts, they do not sue for breach of any obligation under the recordable contracts as a violation of the 1986 Judgment.

On the Tucker Act issue, whether jurisdiction exists to hear a contract claim for money damages in excess of $10,000 against the United States, the June 5, 1998 ruling is VACATED. Area I's claims must be dismissed for lack of subject matter jurisdiction or transferred to the Court of Claims. Area I Plaintiffs shall have ten (10) days following date of service of this decision to notify the Court whether they wish their money damages claims transferred to the Court of Claims. Federal Defendants shall submit a prepared order that conforms to the decision within fifteen (15) days following date of service of this decision.

So ORDERED.

DATED: April 12, 2000.

/s/ Oliver W. Wanger
OLIVER W. WANGER
United States District Judge

APPENDIX D

43 U.S.C.A. § 390uu

Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated.

(2)

No. 03-1566

In the Supreme Court of the United States

FRANCIS A. ORFF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioners, irrigators who purchase water from the Westlands Water District in California, sued the United States and federal officials for money damages, alleging that the United States breached its water service contract with Westlands. The question presented is:

Whether the court of appeals correctly determined that petitioners could not sue the United States for an alleged breach of Westlands' contract with the United States because petitioners are not intended third-party beneficiaries of that contract.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 358 F.3d 1137. The opinion and order of the district court on the motion for reconsideration (Pet. App. 23a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2004. The petition for a writ of certiorari was filed on May 18, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In recent years, the federal government has reduced the amount of irrigation water that it delivers from some portions of the California Central Valley Project

in order to comply with congressional mandates to mitigate the Project's impact on endangered and threatened fish and wildlife. Petitioners, a group of irrigators who purchase Central Valley Project water from Westlands Water District (Westlands), filed suit against the United States and federal officials, alleging that the reduced water deliveries violate various rights they claim to hold through a 1963 contract between the United States and Westlands. Petitioners sought money damages for those alleged deprivations. The district court held that petitioners could not sue for violation of the 1963 contract because they are neither parties to, nor intended third-party beneficiaries of, the contract. Pet. App. 23a-46a. The court of appeals affirmed in relevant part, holding that petitioners are not intended third-party beneficiaries of the 1963 contract. *Id.* at 9a-14a.

1. The Central Valley Project is a federal reclamation project designed "to re-engineer [the] natural water distribution" of California's Central Valley. See generally *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 728 (1950). The Project consists of a collection of dams, reservoirs, hydropower generating stations, canals, electric transmission lines, and other infrastructure used to accomplish the Project's purposes. See *id.* at 733. Congress initially authorized funds for the Project under the Emergency Relief Appropriation Act of 1935, ch. 48, 49 Stat. 115. Congress reauthorized the Project in 1937 as a federal reclamation project under the River and Harbor Act of 1937 (1937 Act), ch. 832, § 2, 50 Stat. 850, and has since amended or supplemented the 1937 Act many times.

In 1963, the United States, acting pursuant to federal reclamation statutes, entered into a long-term water service contract (1963 contract) with Westlands. Pet.

App. 3a; Appellants' Excerpts of Record (AER) 136-181. At the time, the United States was in the process of constructing the San Luis Unit of the Central Valley Project. See AER 138. Under the 1963 contract, the United States agreed to furnish water to Westlands from the San Luis Unit, and Westlands agreed to pay for such water. The contract specifies maximum quantities of water to be sold annually. See *id.* at 143-146.

2. In February 1993, the Bureau of Reclamation (Bureau) announced its initial allocation of Central Valley Project water for 1993. See Pet. App. 3a. Under the allocation, agricultural contractors south of the Sacramento-San Joaquin Delta, such as Westlands, were to receive only 50% of their maximum contractual supply of Central Valley Project water. Contractors north of the Delta were to receive 100% of their supply, as were "exchange contractors" south of the Delta. See *ibid.*[1]

[1] Contractors south of the Delta depend on pumps to deliver their water. The operation of these pumps can harm fish. Following the listing of winter-run chinook salmon and delta smelt as threatened species, 58 Fed. Reg. 12,854 (1993) (delta smelt); 55 Fed. Reg. 46,515 (1990) (chinook salmon), the Bureau imposed operating restrictions on the pumps to reduce losses to those species in accordance with findings made by the National Marine Fisheries Service and the Fish and Wildlife Service. Those operating restrictions, in turn, reduced the amount of water that the Bureau could deliver south of the Delta. See *Barcellos & Wolfsen, Inc.* v. *Westlands Water Dist.*, 849 F. Supp. 717, 720-721 (E.D. Cal. 1993).

The Bureau does not, however, reduce water deliveries to exchange contractors, even though they are south of the Delta, because exchange contractors present a special situation. When the Bureau began building the Central Valley Project, it entered into contracts with holders of senior downstream water rights that were affected by the Project. Under those "exchange contracts," the holders of downstream water rights agreed not to exercise their rights in exchange for a commitment by the Bureau to provide "substitute water" from the Central Valley Project. The term "exchange contractors" refers to the parties to the exchange contracts and their successors in interest. See *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667, 669 (9th Cir. 1993).

In May 1993, Westlands filed this action challenging the Bureau's reductions in deliveries of water to Westlands. See Pet. App. 3a-4a, 25a; Westlands Excerpts of Record (WER) 1-18. Westlands' complaint alleged that the defendants had violated the Due Process and Just Compensation Clauses of the United States Constitution, U.S. Const. Amend. V; the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*; and the Endangered Species Act, 16 U.S.C. 1531 *et seq.* See WER 10-15. Westlands requested injunctive relief and money damages. See *id.* at 16.

Westlands, joined by three other water districts, later filed a first amended complaint. The amended complaint set forth claims that were virtually identical to those alleged in Westlands' original complaint. A number of other persons and entities subsequently intervened, some as plaintiffs and some as defendants. As a result of intervention, the plaintiffs consisted essentially of two groups: (1) water districts, water agencies, and irrigation districts; and (2) petitioners, who are individual landowners and water users who purchase water from Westlands. The defendants consisted of federal agencies and a variety of fishing and wildlife-protection groups. See Pet. App. 4a, 25a.

3. Over time, various negotiations and agreements among the State of California, the federal government, and urban, agricultural, and environmental interests resolved many of the concerns that had led the water districts to file suit. Accordingly, in September 1995,

the water districts dismissed their complaint, leaving only petitioners' complaints, and the case proceeded on petitioners' claims. See Pet. App. 4a, 25a. Among their numerous claims, petitioners asserted the cause of action at issue here, which alleges that the United States is liable to petitioners for breach of the federal government's contract with Westlands. See WER 40-41. Petitioners predicated that claim on 43 U.S.C. 390uu, which waives the United States' sovereign immunity from "any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law." See Pet. App. 4a-5a, 26a, 47a. Petitioners contended that Section 390uu not only waives the United States' sovereign immunity to suit by the contracting party, Westlands, but also subjects the United States to the individual farmers' claims for money damages. See *id.* at 4a-5a, 26a; WER 34.

The district court denied the parties' cross-motions for summary judgment. Each of the parties sought reconsideration. The federal government contended, among other things, that 43 U.S.C. 390uu's waiver of sovereign immunity does not allow petitioners to sue under Westlands' contract because petitioners are not intended third-party beneficiaries of the contract. On reconsideration, the district court agreed, holding that, although petitioners are third-party beneficiaries of Westlands' 1963 contract, they are only incidental beneficiaries (as opposed to intended beneficiaries) and therefore have no right to enforce the terms of the contract against the United States. Pet. App. 27a-34a. The district court ultimately ruled in favor of the federal government on all of petitioners' claims and

entered final judgment against petitioners. *Id.* at 21a-22a.

4. The court of appeals affirmed in part and vacated in part. Pet. App. 1a-20a. Although petitioners raised and the court ruled on numerous issues, only one is relevant here. The court of appeals agreed with the district court's determination that sovereign immunity bars petitioners' claims under Westlands' contract. *Id.* at 5a-17a. It concluded that the waiver of sovereign immunity in 43 U.S.C. 390uu does not extend to petitioners' claims because petitioners are not intended third-party beneficiaries of Westlands' water service contract with the United States. The court of appeals vacated the district court judgment to the extent that it addressed the merits of petitioners' claims. Pet. App. 17a-20a.

ARGUMENT

The court of appeals correctly concluded that petitioners are not intended third-party beneficiaries of Westlands Water District's water service contract with the United States. That decision does not conflict with any decision of this Court or any other court of appeals. The only two courts of appeals to address the issue—the Ninth Circuit and the Federal Circuit—apply the same legal principles in determining third-party-beneficiary status. Any difference in outcome among particular cases in those courts reflects differences in the particular facts and does not present any issue warranting this Court's review.

1. In determining that petitioners do not have standing to sue on Westlands' contract with the United States, the court of appeals correctly relied on general principles of contract law. See Pet. App. 9a-17a. The court had previously recited those principles in

Klamath Water Users Protective Ass'n v. *Patterson*, 204 F.3d 1206 (9th Cir. 1999), cert. denied, 531 U.S. 812 (2000). The court explained in *Klamath* that, "[b]efore a third party can recover under a contract, it must show that the contract was made for its direct benefit—that it is an intended beneficiary of the contract." *Id.* at 1210. An incidental third-party beneficiary, by contrast, lacks standing to sue on the contract. *Id.* at 1211. To distinguish intended from incidental third-party beneficiaries, courts look to whether the parties to the contract exhibited an intent to confer contractual rights on the third party. *Ibid.* (citing Restatement (Second) of Contracts § 302 (1979), and *Montana* v. *United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997)). See Pet. App. 9a-11a.

Applying those principles to petitioners' claim, the court of appeals analyzed Westlands' water service contract with the United States and determined that, although the contract contemplated that irrigators such as petitioners would benefit from the contract, the contract did not express an intent, explicitly or implicitly, to confer any contractual rights on the irrigators. Pet. App. 11a-14a. As the court of appeals explained, neither Article 11(b) of the Westlands 1963 contract, which addresses water supply shortages, nor Article 15 of that contract, which addresses user payment and assessment obligations, manifests any intent to grant irrigators the right to enforce the contract. *Ibid.*

The court of appeals' conclusion is especially compelling in light of the structure of federal reclamation law, which directs the Bureau to establish contractual relationships with the irrigation districts with whom it executes contracts, and not with the end users who in turn purchase water from the districts. The relevant provision of federal reclamation law expressly requires

the Bureau to contract with "an irrigation district or irrigation districts organized under State law," rather than with the end users of the water. 43 U.S.C. 423e. Further, reclamation law specifically designates which parties have standing to sue the government for claims arising out of reclamation contracts, limiting the United States' waiver of sovereign immunity to "contracting entities." 43 U.S.C. 390uu.

Petitioners' contrary view, which rests on debatable policy arguments rather than contractual language or statutory text, is without merit. Petitioners contend (Pet. 23) that irrigators should be able to sue to enforce an irrigation district's contract because the irrigation district may not act with sufficient vigor to protect the interests of the irrigators to whom it delivers water. Petitioners' concern that the irrigation district may fail to fulfill its duties does not, however, justify allowing the irrigators to sue the United States. Instead, if an irrigation district were to neglect its obligations to its members, the irrigators' proper remedy would be to take action against the district.

2. Petitioners contend (Pet. 16-22) that the court of appeals' decision in this case conflicts with the Federal Circuit's decisions respecting third-party beneficiaries. The Federal Circuit, however, applies the same well-established contract law principles that the court of appeals applied in this case to determine whether a plaintiff is an intended third-party beneficiary of a contract. Both courts assess whether the parties to a contract have expressed a clear intent to benefit the third-party plaintiff. See, *e.g.*, Pet. App. 10a; *Dewakuku* v. *Martinez*, 271 F.3d 1031, 1041 (Fed. Cir. 2001); *Roedler* v. *Department of Energy*, 255 F.3d 1347, 1352 (Fed. Cir.), cert. denied, 534 U.S. 1056 (2001); *Klamath*, 204 F.3d at 1210-1211. In making that assessment, both

courts look primarily to the language of the contract to determine the parties' intent. Pet. App. 11a-14a; *Dewakuku*, 271 F.3d at 1041; *Roedler*, 255 F.3d at 1352; *Klamath*, 204 F.3d at 1211.

Petitioners are mistaken in asserting (Pet. 16-19) that the court of appeals' decision in this case specifically conflicts with the Federal Circuit's decision in *H.F. Allen Orchards* v. *United States*, 749 F.2d 1571 (1984), cert. denied, 474 U.S. 818 (1985). Contrary to petitioners' characterizations, the court of appeals in this case did not hold categorically that "farmers in a reclamation project are 'incidental' rather than 'intended' third-party beneficiaries of a service or repayment contract between their district and the Bureau." Pet. 21. Rather, the court examined the specific provisions of Westlands' water service contract with the United States and concluded that the particular contract did not confer any contractual rights on petitioners. Pet. App. 11a-14a. Similarly, the Federal Circuit's brief discussion of third-party beneficiary status in *Allen Orchards* did not categorically hold that all irrigators using water from a reclamation project are intended third-party beneficiaries of reclamation contracts. See 749 F.2d at 1576. In fact, *Allen Orchards* did not involve a reclamation contract at all. Instead, the irrigators in that case claimed to be intended third-party beneficiaries of a "consent decree and subsequent alleged implied contracts." *Ibid.* The two cases simply involve different factual circumstances that have led to different outcomes.[2]

[2] The Federal Circuit's decision in *Allen Orchards* has limited value as a precedent in any event because the court relied on a conclusion respecting state law that is incorrect. In ruling that the irrigators were intended third-party beneficiaries, the Federal Circuit assumed that the irrigators had a property right under Washington state law to the water they put to beneficial use. 749 F.2d at 1576. Since that time, the Washington Supreme Court has held that, under Washington law, recipients of federal reclamation water do not have an appropriative right to the water they use. See *Department of Ecology* v. *United States Bureau of Reclamation*, 827 P.2d 275, 281 (Wash. 1992).

Petitioners cite (Pet. 18-19) several lower court cases from within the Federal Circuit to bolster their claim of a conflict. Those decisions, however, are consistent with the court of appeals' decision in this case. In each case, the court applied the same principles that the court of appeals employed in this case. See *Henderson County Drainage Dist.* v. *United States*, 53 Fed. Cl. 48, 52 (2002) ("The test for determining third-party beneficiary status is whether or not the contract reflects the express or implied intention of the parties to benefit the party claiming third-party beneficiary status.") (citations and internal quotation marks omitted); *Carlow* v. *United States*, 40 Fed. Cl. 773, 781 (1998) ("In order to show a contractual relationship with the defendant as a third-party beneficiary of a contract, the plaintiffs must demonstrate that the parties expressly or impliedly intended that the contract in question specifically benefit the party claiming third-party beneficiary status.") (citations and internal quotation marks omitted); *Schuerman* v. *United States*, 30 Fed. Cl. 420, 428 (1994) (precedent "requires a showing that the contract in question was intended to specifically benefit the party claiming third-party beneficiary status"); *Busby Sch. of N. Cheyenne Tribe* v. *United States*, 8 Cl. Ct. 596, 602 (1985) ("The test generally utilized in this regard is for

plaintiffs to show that they were the intended beneficiaries of the contracts in question.").[3]

In short, there is no conflict between Ninth Circuit and Federal Circuit on the principles for determining third-party beneficiary status. Petitioners are not challenging the court of appeals' use of well-established contract principles regarding third-party beneficiaries, but rather the court of appeals' case-specific determination that petitioners are not intended third-party beneficiaries of their irrigation district's water service contract. Petitioners' objections to the court of appeals' application of properly stated rules of law to particular facts does not warrant further review.[4]

---

[3] Petitioners also cite (Pet. 18-19) *General Dynamics* v. *United States*, 47 Fed. Cl. 514, 531-532 (2000), but that case involved a determination of whether the plaintiffs were real parties in interest and did not address whether the plaintiffs were intended third-party beneficiaries to a contract. In any event, the contract at issue in *General Dynamics* was clearly intended to confer contractual rights on the plaintiff. See *id.* at 529-530. The government offered the contract to the plaintiff, rather than to its subsidiary, and the contract identified the plaintiff as the contracting entity. *Ibid.*

[4] Even if petitioners could establish that they were intended third-party beneficiaries of Westlands' contract with the United States, and therefore could sue to enforce the contract, Section U.S.C. 390uu would not give the district court jurisdiction over their suit for money damages against the United States. Pet. 14. Section 390uu waives the United States' sovereign immunity for suits for declaratory relief, but not for money damages suits. 43 U.S.C. 390uu (waiver limited to "any suit to adjudicate, confirm, validate, or decree" contractual rights under a reclamation contract); see *Firebaugh*, 10 F.3d at 674 ("We conclude that this statutory provision waives sovereign immunity in this case, where appellants are seeking injunctive and declaratory relief under [reclamation] contracts."); *Wyoming* v. *United States*, 933 F. Supp. 1030, 1038 (D. Wyo. 1996) ("This statute waives the United States' sovereign immunity from a declaratory relief action brought by a party to a contract with the United States to establish the party's rights under that contract."). Except where Congress has specifically provided otherwise, jurisdiction over suits for money damages greater than $10,000 lies only in the Court of Federal Claims. 28 U.S.C. 1346, 1491.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents,

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,

Intervenors-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF INTERVENORS-RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, *et al.*

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QUESTION PRESENTED

Whether the United States has waived its sovereign immunity to a suit, brought by several landowners within the Westlands Water District, to enforce the alleged requirements of a 1963 contract between the District and the United States.

CORPORATE DISCLOSURE STATEMENT

The intervenors-respondents are the Natural Resources Defense Council, United Anglers of California, Save San Francisco Bay Association, California Waterfowl Association, Sierra Club, The Bay Institute of San Francisco, Environmental Defense Fund, California Striped Bass Association, Trout Unlimited of California, Sacramento River Council, California Sportfishing Protection Alliance, Pacific Coast Federation of Fishermen's Associations, and The Wilderness Society. None of the intervenors-respondents has any parent corporation or publicly held company owning ten percent or more of its stock.

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STATEMENT

This case involves a dispute over water deliveries from the Central Valley Project ("CVP"), a federal reclamation project, to the Westlands Water District (the "District"), a California local agency, under the District's long-term water service contract with the United States. In 1993, the United States delivered to the District less than the maximum quantity of water allowed under the District's contract. Pet. App. 3a. Petitioners, who are several landowners within the District, seek to sue the United States for breach of the District's contract. Pet. 4-5,13. The district court ruled on summary judgment that the United States had not waived its sovereign immunity to this claim. Pet. App. at 26a-45a. The government's sovereign immunity defense turns on the threshold question whether petitioners are "contracting entit[ies]" with respect to the District's contract, 43 U.S.C. § 390uu; *see also* Pet. App. 8a, 9a, and the district court concluded that petitioners are neither parties to, nor intended third-party beneficiaries of, that contract. Pet. App. at 26a-45a. The Ninth Circuit affirmed in relevant part. Pet. App. at 17a.

The split alleged by petitioners between the Federal and Ninth Circuits is illusory. The Ninth and Federal Circuits apply the same legal standard in determining whether third parties are intended beneficiaries under a governmental contract. Thus, what petitioners seek is fact-bound correction of the Ninth Circuit's allegedly erroneous application of legal principles upon which the circuit courts agree. The case upon which petitioners rely in alleging a split with the Federal Circuit is factually distinguishable from this case, and presents no inter-circuit conflict.

However, even if it were possible to construe a split with the Federal Circuit, that split would be extremely shallow, making review by this Court premature. Moreover, the question presented is not a matter of national importance, and this case – the ultimate merits of which would not likely be affected by a ruling in favor of petitioners on the question presented in the petition – offers a poor vehicle for deciding the issue. In addition, the third-party beneficiary standard applied by the Ninth and Federal Circuits is correct. For all of these reasons, the Court should deny the petition for a writ of certiorari.

1. Congress enacted the Reclamation Act of 1902 to address twin dilemmas: western settlers' "enormous demand . . . for irrigation systems" and the western states' "lack[] [of] means" to finance the dams, reservoirs, and canals needed to meet this demand. *Peterson v. United States Dep't of Interior*, 899 F.2d 799, 802 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990). Congress originally gave to the Department of the Interior the tasks of not only constructing and operating these massive water storage systems, but also of distributing project water to irrigators. *Id.* at 804. In 1926, however, Congress effectively ended the Secretary's role in water distribution, providing that "[n]o water shall be delivered upon the completion of any new project . . . until a contract or contracts . . . shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts. . . ." 43 U.S.C. § 423e; *see also Peterson*, 899 F.2d at 804; 43 U.S.C. § 485(d) & (e).

The Central Valley Project, in California, is a water storage and conveyance project authorized pursuant to these federal reclamation laws. *See O'Neill v. United States*, 50 F.3d 677, 680 (9th Cir.), *cert. denied*, 516 U.S. 1028 (1995); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 669 (9th Cir. 1993). The United States delivers CVP water to irrigation and municipal water agencies under long-term water supply contracts, most of which were originally executed during the 1940s through the 1960s. *See, e.g., Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1123 (9th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999); *O'Neill*, 50 F.3d at 680. The Westlands Water District receives CVP water pursuant to a contract the District executed with the United States in 1963. *See Firebaugh Canal*, 10 F.3d at 669.

Several provisions of this 1963 contract are relevant. Article 11(a) limits the District's rights when, due to shortage from "any . . . causes," the United States fails to deliver the maximum quantity of water authorized under the District's contract. *See O'Neill*, 50 F.3d at 682-83 & n.2. That Article provides, in pertinent part:

> There may occur times during any year a shortage in the quantity of water available for furnishing to the District through and by means of the Project, but in no event shall any liability accrue against the United States . . . for any damage . . . arising from a shortage on account of errors in operation, drought, or any other causes.

Westlands Water Dist. v. United States, 337 F.3d 1092, 1097 (9th Cir. 2003) (omission in original). Article 11(b) further specifies what remedies may be available to the District, or to anyone claiming "by, through, or under the District," due to a water shortage:

> In the event that in any year there is delivered to the District by reason of any shortage or apportionment as provided in subdivision (a) of this article . . . less than the quantity of water which

> the District otherwise would be entitled to receive, there shall be made an adjustment on account of the amounts paid to the United States by the District for water for said year. . . . To the extent of such deficiency, such adjustment shall constitute the sole remedy of the District or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein.

Pet. App. 13a.

Two other provisions of the 1963 contract establish that the United States' financial relationship is with the District, and that the District is obligated to pay the United States for water service regardless of any nonpayment by the District's customers. Article 14 provides, in relevant part:

> The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District.

Pet. App. 31a. Finally, Article 15 provides, in relevant part:

> Should any assessment or assessments required by the terms of this contract and levied by the District against any tract of land or water user in the District and necessary to meet the obligations of the District hereunder be judicially determined to be irregular or void . . . then such tract shall have no right to any water furnished to the District pursuant to this contract, and no water made available by the United States pursuant thereto shall be furnished for the benefit of such lands or water users, except upon the

> payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rate and upon the terms and conditions provided for herein is a prerequisite to the right to the use of water furnished to the District pursuant to this contract, and no irregularity in levying taxes or assessments by the District nor lack of authority in the District . . . shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid by such water user.

Pet. App. 11a-12a.

2. By the 1980s, after more than a half-century of massive federal and state water diversions, the Central Valley's natural environment was under considerable stress and a number of its indigenous species were on the brink of extinction. *See, e.g.*, *NRDC v. Houston*, 146 F.3d at 1124; *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1129-34 (E.D. Cal. 1992). Among these species were the Sacramento River winter-run Chinook salmon, which in 1990 the National Marine Fisheries Service listed under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* as threatened with extinction, and

the Delta smelt, which in 1993 the U.S. Fish and Wildlife Service listed as threatened with extinction. *See O'Neill*, 50 F.3d at 681; *see also* 50 C.F.R. §§ 17.11, 224.101(a).[1] Subsequently, the National Marine Fisheries Service and Fish and Wildlife Service concluded that certain operations of CVP facilities could jeopardize the continued survival of these species. Pet. App. 3a; *O'Neill*, 50 F.3d at 681.

Around the same time, Congress enacted the Central Valley Project Improvement Act of 1992 ("CVPIA"), Pub. L. No. 102-575, 106 Stat. 4706 *et seq.* (1992). Express purposes of this Act were to "protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley"; to "address impacts of the Central Valley Project on fish, wildlife and associated habitats"; and to restore "balance" among agricultural, urban and environmental water demands on the CVP. CVPIA § 3402(a), (b) & (f), 106 Stat. 4706. The CVPIA amended the CVP's authorizing legislation to make the protection and restoration of fish and wildlife explicit Project purposes, co-equal with storage and delivery of water for irrigation, *see* CVPIA § 3406(a), 106 Stat. 4714, *amending* Act of Aug. 2, 1937, 50 Stat. 850, and directed the Secretary of the Interior, "immediately upon enactment of this title," to operate the Central Valley Project "to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act," and to "dedicate and manage annually eight hundred thousand acre-feet of Central

[1] In 1994, the National Marine Fisheries Service changed the listing status of the Sacramento River winter-run Chinook salmon from "threatened" to "endangered." *See* 59 Fed. Reg. 440 (1994).

Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title . . . ." CVPIA § 3406(b) & (b)(2), 106 Stat. 4714-15.

As a result of Congress' enactment of the CVPIA, and of the listing of the winter-run Chinook salmon and Delta smelt under the Endangered Species Act, the Bureau of Reclamation in 1993 delivered to the District less than the maximum quantity of water authorized by the District's 1963 water service contract. Pet. App. 3a. Several lawsuits ensued. *See id.*; *O'Neill*, 50 F.3d at 680-82.

3. In March 1993, a group of plaintiffs, including petitioners, filed a motion to enforce a stipulated judgment that had in 1986 been entered in *Barcellos & Wolfsen, Inc. v. Westlands Water District*, No. CV 79-106-EDP (E.D. Cal. 1986). Pet. App. 3a-4a, 16a. These plaintiffs, who are individual landowners within the District, contended that the United States' reduction of water deliveries in 1993 breached the United States' contractual obligations to the District and therefore also violated the *Barcellos & Wolfsen* stipulated judgment, which they alleged had compelled compliance with that contract. *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 720-21 (E.D. Cal. 1993). The district court rejected this claim on the merits, and the Ninth Circuit affirmed. *O'Neill*, 50 F.3d at 689. The court of appeals reasoned that "Article 11(a) [of the District's contract] unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate." *Id.* at 689. This Court denied the landowners' petition for a writ of certiorari. *See* 516 U.S. 1028 (1995).

Meanwhile, the District in 1993 filed its own lawsuit – the instant case – and petitioners intervened. *O'Neill*, 50 F.3d at 689 n.7; Pet. 13. The District's complaint sought injunctive relief against the Secretary of the Interior under, *inter alia*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, 4332. *See Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457, 459, 461 (9th Cir. 1994). After the district court granted a preliminary injunction in favor of the District, the Ninth Circuit, on interlocutory appeal, vacated the injunction. *Id.* at 460-62. The District then voluntarily dismissed its complaint. Pet. App. 4a.

Following the District's voluntary dismissal, petitioners sought to continue to prosecute the present case in their own names. *Id.* Whereas the District had sought injunctive relief under various statutory theories, petitioners now seek damages from the United States for its alleged 1993 breach of contract. Pet. i, 14.[2] The alleged breach includes the same reduction in water deliveries over which petitioners sued, unsuccessfully, in *O'Neill*. Pet. 13; Pet. App. 3a.

The district court, per Judge Oliver W. Wanger, ultimately held that, because petitioners were neither signatories to nor "intended third-party beneficiaries" of the District's contract, the United States had not waived its sovereign immunity as to their contractual breach claim. Pet. App. 31a-34a, 45a. The only relevant waiver of

[2] Petitioners originally pursued a number of additional statutory, constitutional, and other non-contractual legal theories, *see* Pet. App. 21a-22a, but they have abandoned those theories in their petition.

sovereign immunity, located at 43 U.S.C. § 390uu, provides in relevant part:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty. . . .

In essence, the district court concluded that petitioners are not "contracting entities" as to whom the section 390uu waiver of sovereign immunity applies. Pet. App. 27a-34a.

The Ninth Circuit affirmed, in a decision authored by Judge Clifton and joined by Judges Noonan and Thomas. The court explained that before third parties (such as petitioners) may sue to enforce a contract (and thus, in this case, defeat the United States' claim of sovereign immunity), they must first show that they are "'the intended beneficiary of the contract.'" Pet. App. 10a (citation omitted).

In distinguishing between "intended" third-party beneficiaries (who may sue to enforce a contract) and "incidental" beneficiaries (who may not), the court turned to its earlier holding in *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir.), *cert. denied*, 531 U.S. 812 (2000). Pet. App. 10a. There, the court had held that certain irrigators in the Klamath Basin were not "intended" third-party beneficiaries of a contract between the United States and PacifiCorp involving operation of a federal dam. *Id.* at 1209. In reaching that conclusion, *Klamath Water Users* had, in turn, employed the Federal Circuit's own

recently articulated third-party beneficiary standard. *See id.* at 1211-12 (citing *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997)).

Specifically, the Federal Circuit had, fourteen years after *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed. Cir. 1984), ruled in *Montana v. United States* that a third party may to sue to enforce a governmental contract only where certain conditions exist:

> [T]he contract must 'reflect[] the express or implied intention of the parties to benefit the third-party.' The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class *clearly intended* to be benefited thereby. One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him.

124 F.3d at 1273 (emphasis added; footnote and citation omitted; second alteration in original).

It was this test that the Ninth Circuit, in *Klamath Water Users*, adopted almost verbatim:

> To sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party. The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class *clearly intended* by the parties to benefit from the contract. One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him or her.

204 F.3d at 1211 (emphasis added; internal citations and footnote omitted).

And it was this *Montana / Klamath Water Users* "clear intent" standard that the Ninth Circuit applied to the instant case. Pet. App. 10a. Writing for a unanimous panel, Judge Clifton acknowledged that Articles 11(b) and 15 of the District's contract with the United States mentioned third-party water users, but reasoned that the mere mention of third parties alone is not sufficient to find a clear intention by the parties to contract for those third parties' direct benefit. Pet. App. 11a. Article 15 of the District's contract, the court reasoned, simply established requirements for separate contracts that the District would enter into with its customers. Pet. App. 12a-13a. As for Article 11(b)'s reference to persons claiming "by, through, or under the District," this language could only "sensibly" refer to individuals to whom the District has contractually assigned its rights and duties under the contract. Pet. App. 13a-14a. Thus, the court could find no clear intention in the District's contract to make petitioners or other District landowners "intended," as opposed to "incidental," beneficiaries of the contract. Pet. App. 12a-14a.

DISCUSSION

The petition for a writ of certiorari presents no question meriting this Court's review. The split alleged by petitioners is illusory, for the Ninth Circuit here applied the Federal Circuit's own legal standard for determining whether third parties are intended beneficiaries under a governmental contract. What petitioners seek is fact-bound error correction of the Ninth Circuit's application of

settled contract law principles upon which the courts of appeals agree. The case upon which petitioners rely in alleging a split with the Federal Circuit is factually distinguishable from this case, and therefore presents no conflict.

Even if it were possible to construe a split, however, that split would be extremely shallow, making review by this Court premature. The paucity of cases addressing the issue raised by the petition indicates that the question presented is not a matter of pressing national importance. This case also presents a poor vehicle through which to address this issue, as a prior judgment bars the relief petitioners seek and resolution of the question presented in favor of petitioners is thus unlikely to affect the ultimate outcome of this case. In any event, the third-party beneficiary standard applied by the Ninth and Federal Circuits is correct. For all of these reasons, the Court should deny the petition for a writ of certiorari.

1. *The ci. uit split alleged by petitioners is illusory.*

(a) Although petitioners profess to find a conflict between the intended third-party beneficiary standards applied by the Ninth Circuit and the Federal Circuit, no such conflict exists. The Ninth Circuit here examined the language of the District's contract to ascertain whether that contract evinced a "clear intent" to benefit petitioners directly. Pet. App. 10a. This "clear intent" standard was originally announced by the Federal Circuit itself, and has been followed by that court at least since *Montana v. United States*, 124 F.3d 1269 (Fed. Cir. 1997). *See, e.g.*, *Caguas Cent. Fed. Sav. Bank v. United States*, 215 F.3d 1304, 1309 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001). Far from conflicting with the Federal Circuit, the

Ninth Circuit's decision followed its sister circuit's lead. Because the Ninth and Federal Circuits apply the same third-party beneficiary standard, petitioners' alleged split is illusory. What petitioners actually seek is fact-bound review of the Ninth Circuit's allegedly erroneous application of settled contract principles on which the courts of appeals agree. This Court does not normally sit to review a single circuit's application of a properly stated rule of law. *See* Supreme Court Rule 10.

(b) Nor does the decision below conflict with the Federal Circuit's pre-*Montana* decision in *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984), in which the Federal Circuit ruled that certain individual irrigator plaintiffs could sue as intended third-party beneficiaries to enforce "alleged implied contracts" and a consent decree between a Washington State irrigation district and the United States. The only express basis for *H.F. Allen Orchards*' finding of intended third-party beneficiary status renders that case factually distinguishable from the decision below. Specifically, *H.F. Allen Orchards* rested on the "undisputed" premise that the irrigator plaintiffs there had "a property right" in the water to which the agreements applied. 749 F.2d at 1576. The grounds on which that premise rested do not exist here.[3] Unlike in *H.F. Allen Orchards*, the United States

[3] This property interest arose from the particular circumstances of the Yakima Project. As noted in *Ickes v. Fox*, 300 U.S. 82, 89, 90, 94 (1937), the Yakima Project's water rights were originally obtained by the individual farmers themselves, not by the United States, and the United States had initially contracted with those farmers directly, only establishing a contractual relationship with an irrigation district many years later. *See also* Pet. 16.

acquired its CVP water appropriation permits directly and holds the associated property interests in its own name. *See, e.g.*, *County of San Joaquin v. State Water Res. Control Bd.*, 54 Cal. App. 4th 1144, 1156 n.12 (Cal. Ct. App. 1997), *cert. denied*, 522 U.S. 1048 (1998); California State Water Res. Control Bd., Revised Decision 1641, 1999 WL 1678482, at *83 (Mar. 29, 2000); *see also United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 145 (Cal. Ct. App. 1986) ("The trial court rejected the first argument on the basis that the federal contractors have no water rights of their own but are subject to the limitations of the permits held by the CVP."). Also unlike in *H.F. Allen Orchards*, the United States contracted with the District from the outset, not first with petitioners. And here, unlike in *H.F. Allen Orchards*, the California State Water Resources Control Board, the state's water rights agency, has specifically held, as a matter of California law, that the United States, not the District or its irrigators, owns the water rights at issue. *See* Revised Decision 1641, 1999 WL 1678482, at *83-*84 (citing *Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 34 (1929); *Erwin v. Gage Canal Co.*, 226 Cal. App. 2d 189, 192 (Cal. Ct. App. 1964)).[4]

[4] Under section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, questions regarding the appropriative water rights of the Bureau of Reclamation are governed by state law "in all respects not directly inconsistent with [congressional] directives." *California v. United States*, 438 U.S. 645, 678 (1978); *cf. United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 853-54 (9th Cir. 1983) (Kennedy, J.) (holding that section 8 incorporates the "special rule[s]" of each state). The California Supreme Court has specifically disavowed the notion, advanced by petitioners, that the Bureau holds its CVP water rights merely as a trustee for the irrigators or other ultimate users of CVP

(Continued on following page)

Because this case is factually distinguishable from *H.F. Allen Orchards*, the Ninth Circuit's decision creates no conflict with the Federal Circuit. On the contrary, the Ninth Circuit applied the same third-party beneficiary standard as announced by the Federal Circuit in *Montana*.[5]

2. *The court of appeals' decision does not present an issue of exceptional or nationwide importance.* As we have explained, the Ninth and Federal Circuits presently apply the same "clear intent" standard when analyzing whether a particular governmental contract may be enforced by members of the public that benefit from that contract. To the extent petitioners merely argue that the Ninth Circuit

water. *See Ivanhoe Irrigation Dist. v. All Parties*, 53 Cal. 2d 692 (1960) ("*Ivanhoe II*") (disavowing *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597 (1957) ("*Ivanhoe I*"), *reversed sub nom. Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958)).

[5] Because the Ninth Circuit adopted the same legal standard as the Federal Circuit announced in *Montana*, the Ninth Circuit's decision could only conflict with *H.F. Allen Orchards* if *H.F. Allen Orchards* also creates an *intra*-circuit split with *Montana*. To the extent there is any ambiguity in *H.F. Allen Orchards*, it would be appropriate to construe that ambiguity to avoid an intra-circuit split, thereby also eliminating any split between the two circuits. In any event, to the extent there is any doubt whether *H.F. Allen Orchards* conflicts with the decision below (and *Montana*), the circuit split would be extremely shallow and review by this Court premature. Review by this Court may also be unnecessary, as the question of the third-party beneficiary status of Klamath Basin farmers is presently being briefed in the Court of Federal Claims, and that case may provide the Federal Circuit with a timely opportunity to consider any tension in its own case law. *See Klamath Irrigation Dist. v. United States*, Civ. No. 01-591 DGS (Fed. Cl.). Rather than assuming that a present conflict between the two circuits exists, it would be more appropriate for this Court to await further clarification by the Federal Circuit itself.

misapplied that shared standard to the facts of this case, that court's alleged fact-bound mistake would not warrant issuance of a writ of certiorari. *See* Supreme Court Rule 10.

Nor does petitioners' professed need to be able to enforce the District's contract with the United States, over the District's objection, present an issue of exceptional or nationwide importance. Experience teaches that irrigation districts generally represent their landowners' interests quite aggressively. Indeed, although petitioners' own irrigation district dismissed its complaint in this case, it did so only after losing on interlocutory appeal. More generally, the District has shown no reticence in litigating on petitioners' behalf. *See, e.g.*, *Westlands Water Dist. v. United States Dep't of the Interior*, __ F.3d __, 2004 WL 1558290 (9th Cir. July 13, 2004); *Westlands Water Dist. v. United States*, 337 F.3d 1092 (9th Cir. 2003); *Westlands Water Dist. v. United States*, 100 F.3d 94 (9th Cir. 1996); *Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457 (9th Cir. 1994); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993); *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013 (11th Cir. 1992); *Westlands Water Dist. v. Amoco Chem. Co.*, 953 F.2d 1109 (9th Cir. 1991); *Westlands Water Dist. v. United States*, 700 F.2d 561 (9th Cir. 1983); *Westlands Water Dist. Distribution Dist. No. 1 v. Natural Resources Defense Council*, 276 F. Supp. 2d 1046 (E.D. Cal. 2003); *Del Puerto Water Dist. v. United States Bureau of Reclamation*, 271 F. Supp. 2d 1224 (E.D. Cal. 2003); *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111 (E.D. Cal. 2001). The District has, on the contrary, represented petitioners' interests forcefully, through frequent forays to the courthouse.

Because the United States has waived sovereign immunity to breach-of-contract claims by contracting districts, *see* 43 U.S.C. § 390uu, the question of whether and in what circumstances individual landowners within such districts may sue independently has arisen only infrequently. Indeed, although Congress enacted the Reclamation Act more than a century ago, *see* Act of June 17, 1902, 32 Stat. 388, and although Congress directed the Secretary of the Interior more than three-quarters of a century ago to contract with water agencies rather than individual water users, *see* 43 U.S.C. § 423e, petitioners point to just three appellate decisions on the question of when individual water users may sue to enforce such a contract. Two of these decisions, *Klamath Water Users* and the decision below, arose in the Ninth Circuit. The other, *H.F. Allen Orchards*, arose in the Federal Circuit. The Fifth, Eighth, and Tenth Circuits – which also encompass portions of reclamation lands, *see* http://www.usbr.gov/main/about/ (visited July 19, 2004) – have apparently never considered the question at all. Pet. 19. Given this paucity of case law, the question presented here is neither so common nor so pressing that it requires this Court to consider the issue where the circuits have yet to disagree on any principle of law.

3. *This case presents a poor vehicle for this Court to review the third-party beneficiary standard.* Even assuming a waiver of sovereign immunity were found here, petitioners' claim would almost certainly be rejected on other grounds. This case therefore presents a poor vehicle for addressing the intended third-party beneficiary issue on which petitioners seek review.

Petitioners' present claim is quite narrow, involving water deliveries in one year, more than a decade ago,

under the District's contract with the United States. The ultimate merits question at issue – whether the United States violated a contractual obligation to petitioners in 1993 – was finally adjudicated against petitioners almost ten years ago in *O'Neill*, 50 F.3d at 689. That case held that the District's contract expressly absolves the United States of liability for reductions in delivery caused by any cause, including compliance with subsequently enacted statutes. *O'Neill* was correctly decided and is, in any event *res judicata* as to petitioners' claim that the United States in 1993 breached its contractual obligations. *See generally Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Thus, even if petitioners were to succeed in defeating the government's claim of sovereign immunity, they would be unlikely to obtain the ultimate relief they seek. This Court should await a vehicle in which the third-party beneficiary determination is likely to matter to the outcome of the case.

4. *The third-party beneficiary standard followed by the Ninth Circuit, and the Federal Circuit in* Montana, *is correct.* Finally, the Ninth Circuit was correct in its conclusion that members of the public who benefit from governmental service contracts should not be allowed to sue to enforce those contracts absent a clear intention by the contracting parties to confer such rights on the public. As explained in the Restatement (Second) of Contracts, "[g]overnment contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." Restatement (Second) of Contracts § 313 cmt. a (1981). The particular contract at issue here, between the United States and the District, evinces no clear intention to allow the District's many landowners each to pursue separate

suits to try to enforce their own theories regarding this contract.

The United States has signed literally hundreds of different water service contracts involving the Central Valley Project. These contracts involve both irrigation and municipal water service. Some of these contracts ultimately provide water to hundreds of thousands (and in the case of one large contractor, the Santa Clara Valley Water District, more than 1.5 million) individual California customers. *See, e.g.*, http://www.valleywater.org/About_Us/District_Info/FAQs.shtm (visited July 20, 2004); http://www.valleywater.org/Water/Where_Your_Water_Comes_From/index.shtm (visited July 20, 2004). If petitioners' third-party beneficiary theory were correct, then the United States would be subject to breach-of-contract suits, not just by petitioners, but by each of the innumerable members of the public who (although having no direct contractual relationship with the federal government whatsoever) ultimately put Central Valley Project water to beneficial uses ranging from agricultural irrigation to watering their lawns and brushing their teeth. Nothing in the text of 43 U.S.C. § 390uu or in precedent compels either such an unworkable result or such a sweeping waiver of sovereign immunity. *See generally Lane v. Pena*, 518 U.S. 187, 192 (1996) (holding that a waiver of the government's sovereign immunity must be "strictly construed, in terms of its scope, in favor of the sovereign."). The Ninth Circuit's application of the Federal Circuit's *Montana* standard to the facts of the District's contract was correct and does not call for an exercise of this Court's supervisory power.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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The opposition briefs filed by respondents Bureau of Reclamation and NRDC intervenors make one main, as well as a dozen other, new points. Section 1 of this brief replies to the main point, and Section 2 replies succinctly to each of the others.

1. THE CONFLICT BETWEEN THE FEDERAL AND NINTH CIRCUIT CASES IS NEITHER NON-EXISTENT NOR ILLUSORY

Respondents main new point is that there is "no conflict" between the Federal Circuit's 1984 *H.F. Allen Orchards* decision and the Ninth Circuit's *Orff* decision below. U.S. Brief at 6, 11; NRDC Brief at 12. NRDC adds that any split between the two circuits is "illusory." NRDC Brief at 1, 11, 13. This point lacks merit.

The Bureau argues at the most general level of the law that there is no conflict, because both the Federal and Ninth circuits apply the "same well-established contract law principles." U.S. Brief at 6, 8, 10, 11. Both circuits, it asserts, examine whether the parties to a contract have expressed a "clear intent" to benefit the plaintiff. *Id.* at 7, 8. NRDC also so argues, claiming that both circuits apply the "same legal standard" of clear intent. NRDC Brief at 1, 11, 12, 13, 15.

In addition, at the most specific level of the facts, the Bureau claims that the outcome in *Orff*, compared to *H.F. Allen Orchards*, "reflects differences in the particular facts" and that petitioners challenge a "case-specific determination" relating to the application of the rules to the facts. U.S. Brief at 6, 11. NRDC similarly argues the two cases are "factually distinguishable" and petitioners merely seek a "fact-bound" correction of the application of rules to facts. NRDC Brief at 1, 11, 12, 13, 15.

Most federal contract cases involve a search for the intent of the parties.[1] And no contract dispute is identical in all factual respects to any other.[2] But the two assertions made by respondents at the margins of the question presented miss the great middle ground where the two cases were decided and where they directly conflict.

The facts *H.F. Allen Orchards* deemed legally relevant to determine the intent of the parties were twofold. First, the farmers "have a property right in the water to the extent of their beneficial use," "ultimately pay for" the water, and are "the true parties in interest." 749 F.2d 1571, 1576 (Fed. Cir. 1984). Second, their irrigation district acts as "a surrogate for the aggregation of farmers." *Id.* The Court did not deem an irrigation district to be a general-purpose government, nor a farmer to be a member of the public.[3] It did not, therefore, presume that the farmers were incidental third-party beneficiaries. And, accordingly, it did not parse the contracts at issue to find a clause stating explicitly that the farmers were intended beneficiaries entitled to sue the Bureau.

---

[1] The eponymous purpose of the clear intent principle or standard in the instant context is to ascertain whether the third-party beneficiary is intended, or incidental. This was the task of the Federal Circuit in *H.F. Allen Orchards.* 749 F.2d at 1576 (farmers were "intended" beneficiaries). This is also the focus of the Ninth Circuit's inquiry in *Orff.* Appendix A at 9a, 10a, 11a, 14a.

[2] The repayment contracts at issue in *H.F. Allen Orchards,* and certain of their terms, are described in some detail in two published decisions. 749 F.2d at 1573, *reversing in relevant part* 4 Cl.Ct. 601, 603, 604, 608, 612 (1984). Two provisions of the service contract construed in *Orff* are similarly described in detail. Appendix A at 11a-14a. While the terms of the reclamation contracts in the two cases are not identical, they are indistinguishable in material respects.

[3] Respondents do not contest petitioners' showing that, based on this Court's jurisprudence, an irrigation district is not a general-purpose government. Petition at 4-5 n.6, 27.

The rules applied below in *Orff* to ascertain intent are in direct conflict. *Orff* starts with a "presumption" of incidental status. Appendix A at 15a n.5. It is so "presumed," applying Section 313(2) of the *Restatement (Second) of Contracts*, by characterizing an irrigation district as a "government" and its farmers as "individual members of the public." *Id. at* 10a. The Court concludes that the two sections of the 1963 contract it construed were not sufficient to "rebut" the presumption of incidental status. *Id.* at 15a n. 5. Acknowledging that the 1963 contract was made by the Bureau and the Westlands Water District with the farmers "in mind" and that it operates to their "benefit," *Orff* holds that such facts are "not enough" to find intended status. *Id.* at 14a, 15a n. 5.

Thus, the operative rules applied by the two circuit courts to determine the intent of the contracting parties and the status of the farmers were totally different, as were the facts each court found legally relevant to that inquiry. On this decisive ground, *H.F. Allen Orchards* and *Orff* are in direct conflict, and the two circuits are unmistakably split.

If the Bureau and NRDC see no conflict between *H.F. Allen Orchards* and *Orff*, and no split in the Federal and Ninth circuits, the Ninth Circuit, itself, has little doubt about such division. It explicitly notes *Orff* may be "at odds" with *H.F. Allen Orchards.* Appendix A at 14a n.5. The Federal Circuit, it acknowledges, "did not . . . examine any contract language." *Id.* In contrast, "the law in [the Ninth] circuit requires an examination of the precise language of the contract." *Id.* at 15a n.5. The *Orff* opinion concludes that, to the extent *H.F. Allen Orchards* "employs a different approach and reaches a different result, we respectfully disagree." *Id.*

Accordingly, the Bureau's related assertions—that *H.F. Allen Orchards* "did not categorically hold" that all irrigators are intended beneficiaries of reclamation contracts, and *Orff* "did not hold categorically" that all are incidental—do not warrant acceptance by the Court. U.S. Brief at 9. All

irrigators suing the Bureau in the Federal Circuit under their district's reclamation contract have standing there, because they are always "the true parties in interest" and their district is always their "surrogate." 749 F.2d at 1576. Conversely, every farmer suing in the Ninth Circuit will hereafter be denied standing, as surely no reclamation contract contains "precise language" manifesting a clear intent to "make farmers intended beneficiaries" and grant them "enforceable rights." Appendix A at 11a, 14a, 15a n.5. The two sets of operational rules applied by they two circuits are, indeed, categorical—and irreconcilable.

2. THE OTHER NEW POINTS RAISED BY RESPONDENTS LACK MERIT

Respondents make four other points about *H.F. Allen Orchards,* which are replied to in paragraphs (a), (b), (c), and (d) below. NRDC makes three points about *Orff*, which are rebutted in (e), (f), and (g). Paragraphs (h) and (i) reply to new points made about 43 U.S.C. § 390uu. And paragraphs (j), (k), and (l) below rebut NRDC policy arguments relating to the importance of the question presented.

(a) The Bureau asserts that *H.F. Allen Orchards* "did not involve a reclamation contract at all," but only a consent decree and alleged implied contracts. U.S. Brief at 9. NRDC makes the same point. NRDC Brief at 13. In fact, the districts there had signed repayment contracts which incorporated or gave rise to the others. 4 Cl.Ct. at 603, 604, 607, 608, 612.

(b) The Bureau argues that *H.F. Allen Orchards* has "limited value as a precedent." U.S. Brief at 9 n.2. Specifically, it claims the Federal Circuit "assumed that the irrigators had a property right under Washington State law to the water" and that such assumption is "incorrect" after *Department of Ecology v. Bureau of Reclamation,* 827 P.2d 275, 281 (Wash. 1992). *Id.* at 10 n.2. This point is incorrect for two reasons. First, *H.F. Allen Orchards* cited *Fox v.*

Ickes, 137 F.2d 30 (D.C. Cir. 1943), for the proposition farmers had a property right in the water. 749 F.2d at 1576. *Department of Ecology* in no way assails *Fox.*[4] Second, the farmer's claim in *Department of Ecology* arose in a role analogous to that of NRDC here. He had unsuccessfully attempted to appropriate—without having any contract or making any payment—the previously appropriated project water which flowed through a stream on his property. Accordingly, *Department of Ecology* has no salience here.

(c) NRDC argues there is an "intra-circuit split" between *H.F. Allen Orchards* and *Montana v. U.S.,* 124 F.3d 1269 (Fed.Cir. 1997) and that, therefore, any "ambiguity" in *H.F. Allen Orchards* should be construed to eliminate the split between it and *Orff.* NRDC Brief at 15. *H.F. Allen Orchards* is not ambiguous. *Montana* has nothing to do with a reclamation contract between the Bureau and an irrigation district and, therefore, in no way contradicts *H.F. Allen Orchards.* 124 F.3d at 1273-74 (state, as trustee for injured workers, is not intended beneficiary of settlement agreement between Commodity Credit Corporation and lenders of a bankrupt sugar company).

(d) NRDC argues the Court should "await further clarification" of *H.F. Allen Orchards* in *Klamath Irrigation District v. U.S.,* now pending in the Court of Federal Claims, which "may" provide the Federal Circuit with an opportunity to consider "any tension" in its own case law. NRDC Brief at 15 n.5. Again, there is no "tension" in the Federal Circuit, and there is no need for "clarification" of *H.F. Allen Orchards.*

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[4] Indeed, *Fox* is unassailable. It derived from this Court's decision in *Ickes v. Fox,* 300 U.S. 82, 95 (1937), which has been powerfully affirmed in subsequent cases. *Nebraska v. Wyoming,* 325 U.S. 589, 614 (1945); *Nevada v. U.S.,* 463 U.S. 110, 116 (1983).

(e) NRDC attempts to distinguish *Orff* from *H.F. Allen Orchards* by asserting that, here, the Bureau "holds the associated property interest in its own name" and "owns the water rights at issue," citing principally D-1641, a 2000 decision of California's State Water Resources Control Board. NRDC Brief at 13-14. Respondents are precluded from making this argument, because it was finally decided against them in *Tulare Lake Basin Water Storage District v. U.S.*, 49 Fed.Cl. 313 (2001), which arose from the very water reallocations involved in *Orff*. The court held that the contractors had the right to use the permitted and contracted quantity of water. *Id.* at 318. It held that in 1978 the state board had determined in D-1485 that the full protection of salmon and smelt was "not ultimately in the public interest." *Id.* at 324. That decision "specifically allowed" for full contract performance. *Id.* at 321. D-1485 defines the scope of contractors' "property rights" and "contract rights." *Id.* at 322. In any event, D-1641, itself, does not support the propositions for which NRDC cites it. The Bureau's interest in the water rights under permits is simply "title." 1996 WL 1678482 at *83, *85. The U.S. intended to operate in the early 1990s in a way that caused shortages to contractors "whether or not" the state board approved the permit changes in 2000. *Id.* at *81. Most importantly, D-1641 did not decide any disputes between the U.S. and its contractors, including those at issue here. *Id.* at *85.

(f) NRDC also cites *Ivanhoe Irrigation District v. All Parties*, 53 Cal.2d 692 (1960), for the proposition that the Bureau does not hold the water rights for petitioners. NRDC Brief at 14-15 n.4. That case validated similar reclamation contracts, recognizing that the Bureau had the power to obtain the water rights necessary to perform them. 53 Cal.2d at 715-16. In no way does it negate farmers' rights under such contracts.

(g) NRDC asserts that "a prior judgment bars the relief petitioners seek and resolution of the question presented in favor of petitioners is thus unlikely to affect the ultimate outcome of this case." NRDC Brief at 12. It explains: "The ultimate merits question at issue – whether the United States violated a contractual obligation to petitioners in 1993 – was finally adjudicated against petitioners almost ten years ago in *O'Neill v. U.S.*, 50 F.3d 677, 689 (9th Cir. 1995)." *Id.* at 18. This assertion is irrelevant to the question presented. It is also incomplete and wrong. It is incomplete, because it says nothing about the farmers' overcharge claims. It is wrong as to their underdelivery claims, because the district court in that case and the instant case has never ruled on whether the U.S. complied with, or violated, federal statutes when it effected the water reallocations in question. *O'Neill*, 50 F.3d at 680, 682, 687-89; Appendix A at 4a, 5a.

(h) Respondents state that 43 U.S.C. § 390uu, enacted in 1982, specifically designates "contracting parties" as parties with standing to sue. U.S. Brief at 8; NRDC Brief at 9. In fact, the statute authorizes suits to adjudicate "the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law." Appendix D. If farmers are intended third-party beneficiaries of their district's reclamation contracts, then they can sue to adjudicate the rights of the district thereunder, as even the Court of Appeal below acknowledges.[5]

(i) The Bureau cites two cases for the proposition that, if petitioners have standing, 43 U.S.C. § 390uu waives immunity "for declaratory relief, but not for money damages

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[5] Congress intended to authorize suits by parties to reclamation contracts "or beneficiaries" thereof. S. Rep. No. 373, 97th Cong., 2d Sess. 18 (1982), reprinted in 1982 U.S.C.C.A.N. 2570, 2582. House members intended that suits could be brought thereunder by a district or "the people in it" or its "members" (Rep. Kazen) or by "the farmers" (Rep. Clausen). 128 Cong. Rec. 8816, 8817 (1982).

suits." U.S. Brief at 11-12 n.4. Neither case it cites so holds. In any event, Westlands farmers have prevailed against the Bureau on this issue. *Sumner Peck Ranch, Inc. v. Bureau of Reclamation,* 823 F.Supp. 715, 746-47 (E.D. Cal. 1993) (statute authorizes suit for money damages against Bureau for breach of 1963 contract); see also *U.S. v. Westlands Water District,* 134 F.Supp.2d 1111, 1156 n.97 (E.D. Cal. 2001) (statute authorizes suit to recover interpled funds under recordable contracts between the Bureau and excess landowners in Westlands). The Bureau is precluded from asserting this argument against Westlands farmers. *U.S. v. Stauffer Chemical Co.,* 464 U.S. 165, 170-71 (1984).

(j) NRDC states that the issue presented has "arisen only infrequently" in the past, and there is a "paucity of case law" on the question. NRDC Brief at 17. Yet, NRDC also argues that affirming *H.F. Allen Orchards,* which has been the sole authority for 20 years, would subject the Bureau to "innumerable" suits and, therefore, would be "unworkable." *Id.* at 19. The question of how often farmers will sue the Bureau if certiorari is granted and the judgment is reversed is best answered by examining the historical record. Before 1984, the district courts occasionally entertained suits by farmers against federal reclamation officials. *E.g., Ickes,* 300 U.S. at 96-97; *Fox,* 137 F.2d at 35-36; *Barcellos & Wolfsen, Inc. v. Westlands Water District,* 491 F.Supp. 263 (E.D. Cal. 1980). Since 1984, one district court has decided on the merits several contract suits brought by Westlands farmers against the Bureau. *E.g., Barcellos & Wolfsen, Inc. v. Westlands Water District,* 899 F.2d 814 (9th Cir. 1990); *Sumner Peck Ranch,* 823 F.Supp. at 745-48; *O'Neill,* 50 F.3d at 682-87; *U.S. v. Westlands,* 134 F.Supp.2d at 1134-54. There is no basis for assuming that districts in the future will be more or less prepared to protect their farmers, or that farmers will be more or less prepared to sue the Bureau. On the other hand, recent events suggest that contract suits by both districts and farmers against the Bureau may hereafter increase for other

reasons—new Congressional legislation, revised executive branch policies, and intensified interest group pressures. Petition at 23.

(k) NRDC asserts that "irrigation districts generally represent their landowners' interests quite aggressively."[6] NRDC Brief at 16. But this was not true in the above-cited cases, nor in either *H.F. Allen Orchards* or *Orff.* It is such cases that make review by this Court of the question presented important.

(l) Finally, NRDC asserts that "the District has shown no reticence in litigating on petitioners' behalf," citing 11 published cases. NRDC Brief at 16. It further asserts that Westlands has "represented petitioners' interests forcefully, through frequent forays to the courthouse." *Id.* Nine of the cases NRDC cites are irrelevant, and two are only marginally so. Two such suits were against pipe suppliers. *Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013 (11th Cir. 1992); *Westlands Water District v. Amoco Chemical Co.*, 953 F.2d 1109 (9th Cir. 1991). Two involved disputes with environmental groups. *Westlands Water District v. U.S.,* 700 F.2d 561 (9th Cir. 1983); *Westlands Water District Distribution District No. 1 v. NRDC,* 276 F.Supp.2d 1048 (E.D. Cal. 2003). Four were disputes between Westlands and other water districts over priority of allocation in water-short years. *Del Puerto Water District v. Bureau of Reclamation,* 271 F.Supp.2d 1224 (E.D. Cal. 2003); *Westlands Water District v. U.S.,* 337 F.3d 1092 (9th Cir. 2003); *Westlands Water District v. U.S.,* 100 F.3d 94 (9th Cir. 1996); *Westlands Water District v. Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993). And in one the Bureau sued Westlands for money, Westland countersued its farmers and interpled the funds, and the farmers

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[6] Respondents do not contest petitioners' showing of doubt that districts have the requisite standing and incentive to recover farmers' damages. Petition at 24.

litigated with the Bureau on the merits. *U.S. v. Westlands,* 134 F.Supp.2d at 1122-23. The final two cases cited by NRDC were suits by Westlands against the Bureau to protect part of its water supply. However, one sought temporary relief as to a small amount of water. *Westlands Water District v. NRDC,* 43 F.3d 457 (9th Cir. 1994). The other relates to a similarly small quantity of water. *Westlands Water District v. Department of Interior,* ____ F.3d ___, 2004 WL 1558290 (9th Cir.); Record of Decision, www.arcata.fws.gov/fisheries/report/treis/ROD12-19-00(b).pdf, at 20. But where was Westlands when its farmers were seriously harmed by the Bureau? As evidenced by the cases cited in paragraph (j) above, when rates were increased, the farmers were on their own. When the Bureau reallocated half their water to the Ocean, they were, again, alone. And when they were not provided with drainage, the farmers had to sue both the Bureau and Westlands. Furthermore, in the case at bar, Westlands and its farmers were allies against the Bureau at the outset, but Westlands dropped out shortly thereafter, again leaving its farmers to fend for themselves. Appendix A at 4a.

Respectfully submitted,

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July 29, 2004

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 03-1566

IN THE

Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 18, 2004
CERTIORARI GRANTED OCTOBER 12, 2004

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Appendix to the Petition For A Writ Of Certiorari at the following pages:

Memorandum Opinion and Order Re: Federal Defendants' Motion to Reconsider, *Orff, et al. v. United States, et al.*, Case No. CV-F-93-5327, U.S. District Court for the Eastern District of California (April 12, 2000) 23a

Final Judgment, *Orff, et al. v. United States, et al.*, Case No. CV-F-93-5327, U.S. District Court for the Eastern District of California (August 11, 2000) 21a

Opinion, *Orff, et al. v. United States*, Case No. 00-16922, U.S. Court of Appeals for the Ninth Circuit (February 18, 2004) 1a

43 U.S.C. § 390uu 47a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. CV-F-93-5327

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
5/17/93	1	COMPLAINT referred to Magistrate Judge Sandra Snyder-Hylton Summons issued fee status paid; Receipt #151676; jury demand Notice re: Consent forms (rm) [Entry date 05/17/93] [1:93cv5327]
5/17/93	2	NOTICE by plaintiff of related case(s) CV-F-79-106-OWW and CV-F-81-245-OWW (rm) [Entry date 05/17/93] [1:93cv5327]
7/28/93	16	1st AMENDED COMPLAINT [1] by plaintiff; jury demand; adding plaintiffs San Benito Co Water, San Luis Water Dist, Panoche Water Dist, defendants DOI, Bur of Reclamation, Nat'l Marine Fisheries, Ronald H Brown, Bruce Babbitt (kd) [Entry date 07/28/93] [1:93cv5327]

DATE	NO.	PROCEEDINGS
9/8/93	28	STIPULATION and ORDER by Judge Oliver W. Wanger granting the filing and serving within 5 days, of complaint-in-intervention and adding Intervenor Kern Co Water Agcy (cc: all counsel) (kd) [Entry date 09/09/93] [1:93cv5327]
9/10/93	29	STIPULATION and ORDER by Judge Oliver W. Wanger permitting intervention of: adding Friant Water Users, Hills Valley Irrg, Pixley Irrg Rag Gulch Irrg Dist, Orange Cove Irrg Dist, Lindsay-Strathmore, Madera Irrg District, Chowchilla Water, Shafter-Wasco Irrg, Friant Power Authority (cc: all counsel) (kd) [Entry date 09/13/93] [1:93cv5327]
9/10/93	30	STIPULATION and ORDER by Judge Oliver W. Wanger permitting intervention: adding San Joaquin River Exchange Contractors Water Authority (cc: all counsel) (kd) [Entry date 09/13/93] [1:93cv5327]
9/16/93	33	MOTION to intervene by Area I Plaintiffs-in-intervention before Judge Wanger 10:00 10/18/93; MEMORANDUM of P/A in support thereof; DECLARATION of William M Smiland; and PROPOSED COMPLAINT of Plaintiffs-in-intervention attached as exhibit B (kd) [Entry date 09/17/93] [1:93cv5327]

DATE	NO.	PROCEEDINGS
10/4/93	40	RESPONSE by federal defendants DOI, Bur of Reclamation, USA, COMM in opposition to motion to intervene by Area I Plaintiffs-in-intervention (kd) [Entry date 10/05/93] [1:93cv5327]
10/5/93	42	BRIEF by intervenor-defendants regarding motion to dismiss complaints [41] (kd) [Entry date 10/05/93] [1:93cv5327]
10/19/93	52	REPLY by intervenor-plaintiffs to response to motion to intervene by Area I Plaintiffs-in-intervention [33] (kd) [Entry date 10/21/93] [1:93cv5327]
10/27/93	60	ORDER by Judge Oliver W. Wanger granting motion to intervene by Area I Plaintiffs-in-intervention [33]; Area I parties shall file their complaint on or before 10/27/93; opposition to motion to dismiss the Federal Defendants and Intervenors NRDC, et al ddl 11/11/93, reply ddl 11/24/93 (cc: all counsel) (kd) [Entry date 10/29/93] [1:93cv5327]
10/27/93	61	INTERVENOR'S COMPLAINT by intervenor-plaintiffs, (kd) [Entry date 10/29/93] [1:93cv5327]
12/14/93	91	STIPULATION and ORDER by Judge Oliver W. Wanger that in the event Water Users are successful in their challenge to the USA authority to assess these charges, the USA, at the discretion of the Secretary of the Interior, shall either: 1) credit payments already made by Water Users against Water Users' respective shares of the then unpaid

DATE	NO.	PROCEEDINGS
		capital costs of the Central Valley Project, or 2) immediately repay such assessments and charges to Water Users, without requiring them to make administrative claim for such repayment. (cc: all counsel) (kd) [Entry date 12/16/93] [1:93cv5327]
3/4/94	119	AMENDED COMPLAINT [61] of Area I plaintiffs-in-intervention Francis A Orff, Brooks Farms II, et al (kd) [Entry date 03/08/94] [1:93cv5327]
3/4/94	120	2nd AMENDED COMPLAINT [16] by plaintiffs Westlands Water Dist,. San Benio Co Water Dist, San Luis Water Dist, Panoche Water Dist; jury demand; adding DOI (kd) [Entry date 03/08/94] [Edit date 04/18/94) [1:93cv5327]
5/19/94	228	ORDER by Judge Oliver W. Wanger re preliminary injunction and bond, that the Federal defendants and those acting for, are enjoinied from implementing Section 3406(b)(2) and 3406(d)(1) for the CVPIA, until NEPA compliance has been achieved or doing any activity which would have substantially the same effect: This injunction is not intended to affect any of the Federal Defendants' pre-CVPIA obligations for CVP water. Further Ordered that plaintiffs shall post as security, the sum of $100,000.00, to be deposited with the Clerk of the Court (cc: all counsel) (kd) [Entry date 05/20/94] [1:93cv5327]

DATE	NO.	PROCEEDINGS
6/1/94	252	NOTICE OF APPEAL from Dist. Court decisions filed 4/28/94 and 5/19/94 (fee status: paid) (cb) [Entry date 06/07/94) [1:93cv5327]
6/2/94	254	NOTICE OF APPEAL by intervenor-defendant -NRDC from Dist. Court decision (fee status: billed) (cb) [Entry date 06/07/94] [1:93cv5327]
6/27/94	268	ORDER by Judge Wanger denying motion for stay pending appeal by environmental intervenors [237], denying motion for modification of preliminary injunction by Grassland Water Dist and Resource Conservation Dist [235], granting motion to intervene as defendants is granted, leave to appear as amicus curiae in this action by Grassland Water Dist and Grassland Resource Conservation Dist denied [231], denying application for stay [230] (cc: all counsel) (sd) [Entry date 06/28/94] [1:93cv5327]
10/31/94	319	MOTION for summary judgment by Friant Intervenors Hearing 1/9/95 10:00 #2 (sd) [Entry date 11/01/94] [1:93cv5327]
11/1/94	325	MOTION for summary judgment or in the alternative summary adjudication by intervenor Exchange Contractors' Hearing 1/9/95 9:00 #2 (sd) [Entry date 11/01/94) [1:93cv5327]

DATE	NO.	PROCEEDINGS
11/1/94	329	MOTION for partial summary judgment by Kern County Water Agency Hearing 1/9/95 9:00 #2 (sd) [Entry date 11/01/94] [1:93cv5327]
11/1/94	337	MOTION for summary judgment/summary adjudication by plaintiff in intervention County of Fresno Hearing 1/9/95 10:00 #2 (sd) [Entry date 11/02/94] [1:93cv5327]
11/1/94	345	MOTION for judgment on the pleadings or summary judgment on ESA and CVPIA defenses to reclamation claims, meo P/A in support thereof by Area I Plaintiffs-in-Intervention Hearing 1/9/95 9:00 #2 (sd) [Entry date 11/02/94] [1:93cv5.327]
11/1/94	346	MEMORANDUM OF POINTS AND AUTHORITIES OF AMICUS CURIAE in support of plaintiffs' motion for summary judgment by San Joaquin Valley Unified Air Pollution Control District (sd) [Entry date 11/02/94] [1:93cv5327]
12/1/94	361	RESPONSE by intervenor-defendant Invironmental in 1:93-cv-05327 to motion for summary judgment by intervenors Friant Water Users Authority [350-1], to motion for summary judgment/summary adjudication by plaintiff in intervention County of Fresno [349-1], to motion for partial summary judgment by Kern County Water Agency [336-1], to motion for partial summary judgment by Kern County Water Agency [329-1], to motion for summary judgment or in the alternative summary adju-

DATE	NO.	PROCEEDINGS
		dication by intervenor Exchange Contractors' [325-1], to motion for judgment on the pleadings or summary judgment on ESA and CVPIA defenses to reclamation claims, meo P/A in support thereof by Area I Plaintiffs-in-Intervention [345-1] (sc) (Entry date 12/02/94] [1:93cv5327]
12/5/94	367	RESPONSE by Federal defendants to-motion for judgment on the pleadings or summary judgment on ESA and CVPIA defenses to reclamation claims, meo. P/A in support thereof by Area I Plaintiffs-in-Intervention [345-1] (sc) (Entry date 12/05/94] [1:93cv53271
12/16/94	378	REPLY by federal intervenor-defendants USA, Fish and Wildlife, DOI, and Bur of Reclamation opposition to motion for judgment on the pleadings or summary judgment on ESA and CVPIA defenses to reclamation claims, meo P/A in support thereof by Area I Plaintiffs-in-Intervention [345-1] (pa) [Entry date 12/16/94] [1:93cv5327 1:93cv5896 1:94cv6103 1:94cv6131]
12/19/94	384	REPLY by amicus San Joaquin Val Unif in 1:93-cv-05327 to response to motion for summary judgment by intervenors Friant Water Users Authority. [350-1], motion for summary judgment/summary adjudication by plaintiff in intervention County of Fresno [349-1], motion for partial summary judgment by Kern County Water Agency [336-1], motion for partial summary judgment by Kern County Water Agency [329-1], motion

DATE	NO.	PROCEEDINGS
		for summary judgment or in the alternative summary adjudication by intervenor Exchange Contractors' [325-1], motion for judgment on the pleadings or summary judgment on ESA and CVPIA defenses to reclamation claims, meo P/A in support thereof by Area I Plaintiffs-in-Intervention [345-1] (sc) [Entry date 12/21/94] [1:93cv5327]
12/19/94	385	RESPONSE by plaintiff in 1:93-cv-05327 to motion for partial summary judgment by Kern County Water Agency' [336-1], to motion for partial summary judgment by Kern County Water Agency [329-1], (sc) [Entry date 12/21/94] [1:93cv5327]
12/19/94	386	MEMORANDUM by intervenor Friant Water Users in 1:93-cv-05327 in support of motion for summary judgement [350-1] (sc) [Entry date 12/21/94] [1:93cv5327]
12/20/94	387	REPLY by intervenor-plaintiff Francis A Orff to response In OPPOSITION by Government and Delta Interests to motion for judgment on the pleadings or summary judgment on ESA and CVPIA defenses to reclamation claims, meo P/A in support thereof by Area I Plaintiffs-in-Intervention [345-1] (pa) [Entry date 12/22/94] [1:93cv5327]

DATE	NO.	PROCEEDINGS
12/20/94	398	MEMORANDUM by intervenor-plaintiff San Joaquin River in support of motion for summary judgement or in the alternative partial summary judgement on claims [397-1] (sc) [Entry date 01/04/95] [1:93cv5327]
12/27/94	389	RESPONSE by intervenor-plaintiff San Joaquin River in 1:93-cv-05327 to motion for summary judgment/summary adjudication by plaintiff in intervention County of Fresno [349-1], to motion for partial summary judgment by Kern County Water Agency [336-1], to motion for partial summary judgment by Kern County Water Agency [329-1], to motion for summary judgment or in the alternative summary adjudication by intervenor Exchange Contractors' [325-1] (sc) [Entry date 12/29/94] [1:93cv5327]
12/29/94	392	RESPONSE brief in opposition to motion to amend supplemental scheduling order by defendant USA (motion attached in exhibits filed 11/1/94) (sc)
12/30/94	397	MOTION by intervenor-plaintiff San Joaquin River for summary judgment or in the alternative partial summary judgement on claims motion to-be heard by Judge Oliver W. Wanger 2/27/95 at 9:00 (sc) [Entry date 01/04/95] [1:93cv5327]

DATE	NO.	PROCEEDINGS
12/30/94	401	MOTION by intervenor-plaintiff Francis A Orff for summary judgment, for judgment on the pleadings motion to be heard by Judge Oliver W. Wanger, hearing set for 2/27/95 at 9:00 (sc) [Entry date 01/04/95] [1:93cv5327]
1/20/95	419	MEMORANDUM of P/A by intervenor-plaintiff San Joaquin River in support of [397-1] motion for summary judgment and partial motion for summary judgment (lm) [Entry date 01/25/95] [Edit date 01/25/95] [1:93cv5327]
2/21/95	428	CERTIFIED COPY of judgment from 9th Circuit appeal [271-1], appeal [254-1], appeal [252-1] Judgment of said District Court in this cause the temporary injunction is VACATED.(cc: all counsel) (pa) [Entry date 02/21/95] [1:93cv5327]
5/23/95	439	STIPULATION AND ORDER by Judge Oliver W. Wanger dismissing ESA claims and complaints-in-intervention (cc: all counsel) (gl) [Entry date 05/25/95] [1:93cv5327]
9/6/95	442	MOTION to dismiss complaint by plaintiffs before Judge Wanger 10/2/95 10:00 (rm) [Entry date 09/08/95] [Edit date 09/08/95] [1:93cv5327]
10/16/95	452	RESPONSE by intervenor-plaintiff to motion to dismiss complaint by plaintiffs before Judge Wanger [442-1] (gl) [Entry date 10/18/95] [1:93cv5327]

DATE	NO.	PROCEEDINGS
10/23/95	455	REPLY by pltf's Westlands Water Dist and San Benito Co Water regarding motion to dismiss complaint [442-1] (hl) [Entry date 10/24/95] [1:93cv5327]
11/6/95	463	MEMORANDUM, Opinion and Order: by. Judge Wanger GRANTING motion to dismiss complaint by plaintiffs [442-1]; Westland's counsel shall prepare an order of conformity with this memorandum with court within 5 days of service of this opinion (cc: all counsel). (hl) [Entry date 11/08/95] [1:93cv5327]
11/14/95	465	SECOND AMENDED COMPLAINT by Area 1 plaintiff (hl) [Entry date 11/16/95] [1:93cv5327]
1/11/96	484	MOTION for partial summary judgment on pleadings or summary judgment on claims for water year 1993-1994 by Area 1 pltf's before Judge Manger 9:00 3/4/96 #2; memorandum of P&A in support thereof (hl) (Entry date 01/12/96] [Edit date 01/12/96] (1:93cv5327]
1/11/96	485	MOTION for partial summary judgment or summary judgment on claims for water year 1994-1995 by Area 1 pltf's before Judge Wanger 9:00 3/4/96 #2; memorandum of P&A in support thereof (hl) [Entry date 01/12/96] [1:93cv5327]

DATE	NO.	PROCEEDINGS
3/11/96	498	RESPONSE by intervenor's Natural Resources in opposition to motion for partial summary judgment or summary judgment on claims for water year 1994-1995 by Area 1 pltf's [485-1] to motion for partial summary judgment on pleadings or summary judgment on claims for water year 1993-1994 by Area 1 pltf's [484-1] (hl) (Entry date 03/12/96) [1:93cv5327]
3/11/96	501	RESPONSE by intervenor-defendant USA in 1:93-cv-05327 in oppsotion to motion for partial summary judgment or summary judgment on claims for water year 1994-1995 by Area 1 pltf's [485-1] and in support of deft's motion for summary judgment (hl) [Entry date 03/13/96] [1:93cv5327]
4/1/96	505	REPLY by Area 1 pltf's to Govt's nad intervenor's response in opposition to motion for partial summary judgment or summary judgment on claims for water year 1994-1995 by Area 1 pltf's [485-1] (hl) [Entry date 04/02/96] [1:93cv5327]
4/1/96	506	RESPONSE by Area I pltf's Federal deft's motions for summary judgment for water year 1994-1995 by Area 1 pltf's [485-1] and motion for partial summary judgment on pleadings or summary judgment on claims for water year 1993-1994 by Area 1 pltf's [484-1] (hl) [Entry date 04/02/96]. [1:93cv5327]

DATE	NO.	PROCEEDINGS
4/2/96	504	REPLY by Area 1 pltf's to Govt and Intervenor's response in opposition to motion for partial summary judgment on pleadings or summary judgment on claims for water year 1993-1994 by Area 1 pltf's [484-1] (hl) [Entry date 04/02/96] [1:93cv5327]
4/8/96	507	Reply BRIEF by intervenor-defendant USA support of federal deft's, motion for summary judgment [485-1], [484-1] (hl) [Entry date 04/09/96] [1:93cv5327]
4/12/96	508	RESPONSE in opposition by Area I plaintiffs to motion to strike by Intervenor Natural Resources [499-1] (rm) [Entry date 04/15/96] [Edit date 04/15/96] [1:93cv5327]
2/3/97	535	SUPPLEMENTAL BRIEF by plaintiff Francis A. Orff re: impact on pending cross-motions 1:93-cv-05327 (mh) [Entry date 02/04/97] [1:93cv5327]
2/14/97	538	RESPONSE by federal defts in 1:93-cv-05327 to pltfs' supplemental brief [535-1]. (mh) [Entry date 02/18/97] [1:93cv5327]
2/18/97	539	BRIEF by-intervenor Natural Resources, intervenor-defendant Invirorimental re United States v Winstar (lm) [Entry date 02/19/97] [1:93cv5327]
2/28/97	544	REPLY brief by plaintiff Francis A Orff in 1:93-cv-05327 (mh) [Entry date 03/03/97] [1:93cv5327]

DATE	NO.	PROCEEDINGS
4/24/97	548	MEMORANDUM, Opinion and Order: by judge Oliver W. Wanger motion to strike undisputed facts by plaintiffs [499-1] DENIED, motion for summary judgment re 1994-1995 [485-1], 1993-1994 water year [484-1] DENIED (cc: all counsel) (il) [Entry date 04/25/97] [1:93cv5327]
5/30/97	558	MOTION for reconsideration by defendant USA in 1:93-cv-05327 motion TO BE HEARD by Judge Oliver W. Wanger Motion Hearing Set For 7/8/97 at 10:00 (il) [Entry date 05/30/97] [1:93cv5327].
5/30/97	560	MOTION for clarification/reconsideration, and for partial summary judgment by intervenor Natural Resources in 1:93-cv-05327 motion TO HEARD by Judge Oliver W. Wanger, Motion Hearing Set For 7/8/97 at 9:00 (il) [Entry date 05/30/97] [1:93cv5327]
5/30/97	562	MOTION for clarafication/reconsideration by plaintiff Francis A Orff in 1:93-cv-05327 motion TO BE HEARD by Judge Oliver Wanger; Motion Hearing Set For 7/8/97 (il) [Entry date 05/30/97] (1:93cy5327]
6/13/97	564	RESPONSE by intervenor Natural Resources in 1:93-cv-05327 to motion for clarafication/reconsideration by plaintiff Francis A Orff in 1:93-cv-05327 [562-1] (lm) [Entry date 06/16/97] [1:93cv5327]

DATE	NO.	PROCEEDINGS
6/13/97	565	MEMORANDUM of P/A by defendant USA in 1:93-cv-05327 in opposition to plaintiffs' motion for clarification and reconsideration of the court's 4/23/97 memorandum opinion [562-1] (lm) [Entry date 06/16/97] [1:93cv5327]
6/20/97	566	MEMORANDUM. of P/A by intervenor-defendant USA in support of motion for reconsideration (562-1], [560-i] (lm) [Entry date 06/20/97] [1:93cv5327]
6/20/97	567	REPLY BRIEF'by plaintiff Orff et al. in 1:93-cv-05327 regarding dft's opposition to pltf's motion for reconsideration [564-1] (fg) [Entry date 06/23/97] [1:93cv5327]
6/24/97	568	BRIEF by intervenor Natural Resources in 1:93-cv-05327 in support of motion for reconsideration, clarification and partial summary judgment [560-1], [560-2] (lm) [Entry date 06/24/97 [1:93cv5327]
8/29/97	574	NOTICE of points and authorities on the issue of whether 43 USC 390uu provide: subject matter jurisdiction for this Court to hear pltfs claims by defendant USA (rah) [Entry date 09/02/97] (1:93cv5327]
9/3/97	575	RESPONSE by plaintiff Francis A Orff to governments brief re jursidiction [574-1] (mli) (Entry date 09/04/97] [1:93cv5327]

DATE	NO.	PROCEEDINGS
6/4/98	587	STIPULATION AND ORDER by Judge Oliver W. Wanger party Grassland Resource in 1:93-cv-05327, party Grassland Water Dist in 1:93-cv-05327 DISMISSED; (cc: all counsel) (sr) (Entry date 06/04/98] [1:93cv5327].
6/5/98	588	MEMORANDUM, Opinion and Order: by Judge Oliver W. Wanger motions for clarafication/reconsideration [562][560] [558] GRANTED in part and DENIED in part; motion for partial summary judgment by intervenor Natural Resources in [560] GRANTED in part and DENIED in part, (cc: all counsel) (gl) [Entry date 06/09/98] [1:93cv5327]
8/14/98	597	ORDER by Judge Oliver W. Wanger re plaintiffs' motions for clarification and reconsideration of the Court's 4/24/97 memorandum opinion; Federal defts' and Environmental intervenors' motions for reconsideration of the Court's 4/24/97 memorandum opinion and for summary judgment [588-1] (cc: all counsel) (il) [Entry date 08/17/98] [1:93cv5327]
9/2/98	600	Memorandum of Points and Authorities in Opposition by intervenor-defendant USA to motion to intervene pursuant to Rules 24(a) and or 24(b) of the FRCP by plaintiff Westlands Water Dist 1:93-cv-05327, [595-1] (ii) (Entry date 09/03/98] [1:93cv5327]

DATE	NO.	PROCEEDINGS
9/14/98	603	RESPONSE in SUPPORT by pltf Francis A Orff to motion to intervene pursuant to Rules 24(a) and or.24(b) of the FRCP by plaintiff Westlands Water Dist in 1:93-cv-05327 to case(s) 1:93-cv-05327, [595-1] (jv) [Entry date 09/15/98] [1:93cv5327]
9/14/98	604	MEMORANDUM in OPPOSITION by intervenor Natural Resources to motion to intervene pursuant to Rules 24(a) and or 24(b) of the FRCP by plaintiff Westlands Water Dist [595-1] (jv) [Entry date 09/15/98] [1:93cv5327]
9/24/98	606	REPLY by intervenor Westlands Water District to dfts' and Environmental intervenors' memoranda of points. and authorities in opposition to motion to intervene pursuant to Rules 24(a) and or 24(b) .of the FRCP by plaintiff Westlands Water Dist [595-1] (tw) [Entry date 09/25/98] [1:93cv5327]
9/28/98	607	MINUTES of 9/28/98 before Judge Wanger motion to intervene pursuant to Rules 24(a) and or 24(b) of the FRCP by plaintiff Westlands Water Dist [595-1] RESOLVED C/R P Smith (mm) [Entry date 09/29/98] [Edit date 09/29/98] [1:93cv5327]
11/3/98	610	STIPULATION AND ORDER by Judge Wanger motion to intervene pursuant to Rules 24(a) and or 24(b) of the FRCP by plaintiff Westlands Water Dist [595-1] WITHDRAWN (cc: all counsel) (mm) [Entry date 11/03/98] [1:93cv5327].

DATE	NO.	PROCEEDINGS
1/22/99	612	NOTICE OF MOTION AND MOTION for order modifying memorandum opinion dated 6/5/98 by intervenor Westlands Water Dist to be heard before Judge Wanger Motion Hearing Set For 9:00 2/22/99 (jv) [Entry date 01/25/99] [Edit date 01/25/99] [1:93cv5327]
1/22/99	614	MOTION to modify that part of the court's memorandum opinion nad order holding that pltfs have standing to sue the federal dfts under 43 USC 390uu with re to claims arising under contracts between Estlands and-the US by federal dfts USA, Bur of Reclamation, COMM, Natl Marine Fish, Ronald H Brown, Bruce Babbitt to be heard before Judge Wanger Motion Hearing Set For 9:00 2/22/99 ctrm 2 (document submitted as "memorandum in support of motion to modify. . .") (jv) [Entry date 03/05/99] [Edit date 03/05/991 [1:93cv5327]
1/25/99	615	NOTICE OF MOTION AND MOTION for clarification or for interlocutory appeal by intervenor Natural Resources in 1:93-cv-05327 to be heard before Judge Wanger Motion Hearing Set For 9:00 2/22/99. (jv) [Entry date 01/26/99] [1:93cv5327]
2/4/99	619	RESPONSE of non-opposition by intervenor Natural Resources to motion for order modifying memorandum opinion dated 6/5/98 by intervenor Westlands Water District [612-1] (did) [Entry date 02/05/99] [1:93cv5327]

DATE	NO.	PROCEEDINGS
3/4/99	623	RESPONSE in OPPOSITION by Area I pltfs to motion to modify that part of the court's memorandum opinion nad order holding that pltfs have standing to sue the federal dfts under 43 USC 390uu with re to claims arising under contracts between Estlands and the US by federal dfts USA, Bur of Reclamation, COMM, Natl Marine Fish, Ronald H Brown, Bruce Babbitt to be heard before' Judge Wanger [614-1] (jv) [Entry date 03/05/99] [1:93cv5327]
3/4/99	624	RESPONSE in OPPOSITION by Area I pltfs to motion for clarification or for interlocutory appeal by intervenor Natural Resources in 1:93-cv-05327 to be heard before Judge Wanger [615-1] (jv) [Entry date 03/05/99] [1:93cv5327]
3/17/99	625	REPLY by defendant USA in 1:93-cv-05327 regarding motion to modify that part of the court's memorandum opinion and order holding that pltfs have standing to sue the federal defs under 43USC390uu with regard to claims arising under contracts between westlands and the united states; memorandum in support; [615-1] (aa) [Entry date 03/18/99)
3/18/99	626	REPLY by intervenor-defendant Inviron-mental in response to motion for clarification or-for interlocutory appeal by intervenor Natural Resources in 1615-1] (aa) [Entry date 03/19/99] [1:93cv5327]

DATE	NO.	PROCEEDINGS
4/30/99	628	MEMORANDUM, Opinion and Order: by Judge Oliver W. Wanger motion to modify June 5, 1998 memorandum opinion is granted; it is ordered that the following sentence, p.19, line 10-11, is deleted from the June 5, 1998 decision; Any judgment will bind Westlands and Westlands members, including plaintiffs; [588-1] (cc: all counsel) (aa) [Entry date 05/04/99] [1:93cv5327]
9/27/99	633	MEMORANDUM, Opinion and Order: by Judge Oliver W. Wanger motion for clarification or for interlocutory appeal by intervenor Natural Resources in 1:93-cv-05327 to be heard before Judge Wanger (615-1] DENIED (cc: all counsel) (sr) [Entry date 09/28/99] [1:93cv5327]
4/12/00	634	MEMORANDUM, Opinion and Order: by Judge Oliver W. Wanger re motion to modify that part of the court's memorandum opinion nad order holding that pltfs have standing to sue the federal dfts under 43 USC 390uu with re to claims. arising under contracts between Westlands and the US by federal dfts USA, Bur of Reclamation, COMM, Natl Marine Fish, Ronald H Brown, Bruce; Babbitt [614-1] case mgmt ddl set for 5/1/00 for Area I pltf's to notify the court whether they wish their money damgaes claims. transferred to court of claims; case mgmt ddl seft for 5/1/00 for

DATE	NO.	PROCEEDINGS
		Federal defts shall submit a prepareed order that conforms to the decision (cc: all counsel) (hl) [Entry date 04/12/00] [Edit date 04/12/00] [1:93cv5327]
6/16/00	640	MEMORANDUM, Opinion and Order: by Judge Oliver W. Wanger Plaintiff's motion to vacate the Court's 04/12/00 memorandum is DENIED; plaintiff shall notifiy the court whether they wish this case transferred to the court of claims case mgmt ddl set for 6/27/00 (cc: all counsel) (rab) [Entry date 06/19/00] [1:93cv5327]
7/18/00	646	SUPPLEMENTAL STATEMENT by defendant USA re Orff pltfs request to certify issue of standing and to stay remaining portion of this case (sr) [Entry date 07/19/00] [1:93cv5327]
7/27/00	647	OBJECTIONS by Area I plaintiffs in 1:93-cv-05327 to USA's proposed final judgment (sr) [Entry date 07/28/00] [1:93cv5327]
7/31/00	648	RESPONSE by intervenor-defendant USA in 1:93-cv-05327 to Area 1 pltf's objections to U.S. proposed final judgment [647-1] (hl) [Entry date 08/01/00] [1:93cv5327]
8/10/00	650	MEMORANDUM, Opinion and Order: by Judge Oliver W. Wanger objections [647-1] are OVERRULED and motion for reconsideration is DENIED (cc: all counsel) (hl) (Entry date 08/11/00] [1:93cv5327]

DATE	NO.	PROCEEDINGS
8/11/00	651	FINAL JUDGMENT by Judge Oliver W. Wanger in favor of Federal defts and Environmental Intervenors and against pltf's; all claims have been resolved case TERMINATED (cc: all counsel) (hi) [Entry date 08/11/00] [1:93cv5327]
10/4/00	652	NOTICE OF APPEAL from District Court decision re judgment [651-2] (fee status paid receipt no 191242) (rab) [Entry date 10/04/00] [1:93cv5327]
10/17/00	657	NOTICE OF APPEAL by plaintiff Westlands Water Dist in 1:93-cv-05327 from District Court decision re judgment [651-2] (fee status paid) (hl) [Entry date 10/18/00] [1:93cv5327]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 00-16922

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10/13/00	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): NO. setting schedule as follows: appellant's designation of RT is due 10/16/00; appellee's designation of RT is due 10/24/00; appellant shall order transcript by 11/3/00; court reporter shall file transcript in DC by 12/4/00; certificate of record shall be filed by 12/11/00; appellant's opening brief is due 1/22/01; appellees' brief is due 2/20/01; appellants' reply brief is due 3/5/01. [00-169221 (crw) [00-16922]
1/5/01	Filed aplts' response opposing dispositive motion to dismiss appeal of intervening aplt Westlands Water District in 00-17029 [4049750-1] served on 1/4/01 (CONFAT) [00-16922, 00-17029] (dg) [00-16922 00-17029]

DATE	PROCEEDINGS
1/10/01	Received Appellant Westlands Water Dist in 00-17029's addendum to opposition to Federal aples' motion to dismiss appeal (amended proof of service) served on 1/9/01 CONFAT [00-17029, 00-16922] (em) [00-16922 00-17029]
4/30/01	Filed Westlands Water Dist's motion to intervene; served on 4/27/01 [4157663] (MOATT) [00-16922] (dg) [00-16922]
5/23/01	Filed order (Ferdinand F. FERNANDEZ, Kim M. WARDLAW): The unopposed motion of Westlands Water Dist to intervene in this appeal is granted. The clerk shall enter Westlands on the docket as plaintiff-intervenor. [4157663-1] The briefing is amended as follows: Intervenor's brief due 6/8/01; appellees' brief due 8/10/01; the reply brief is due 14 days from sery of aple's brief. [00-16922] (dg) [00-16922]
6/25/01	Filed original and 15 copies aplts' opening brief (Informal: n) 55 pages; 5 excerpts of record (2 Exc.vol); served on 6/22/01 (minor defcy: need copies of DC order; NOA and DC docket. Notified counsel. [00-16922] (em) [00-16922]
6/25/01	Filed original and 15 copies Intervenor in 00-16922's brief, 51 pages; 5 FOR in 2 vols.; served on 6/22/01 with minor defcy need statement of rel cases; cover to reflect Westland as Pltf-intervenor; not aplt. Notified counsel [00-16922] (em) [00-16922]
6/25/01	Filed Appellants' motion to take judicial notice, served on 6/22/01 [4201695] (RECORDS FOR MERITS PANEL**********) [00-16922] (dg) [00-16922]

DATE	PROCEEDINGS
6/27/01	Filed orig & 5 pltfs-aplts' supplemental excerpts of record on appeal in 1 volume; (Vol.3) RECORDS (em) [00-16922]
6/27/01	Filed order (Deputy Clerk: lkk) Aplts' request that the court take judicia! notice, any related filings, any further request for judicial notice shall all be referred to the panel that shall decide the merits of the appeal. [4201695-1] [00-16922] (dg) [00-16922]
7/13/01	[4209700] Filed aplts' motion to dismiss intervenors-aples as parties on appeal; served on 7/12/01. [00-16922] (to CONFATT per their request) (dg) [00-16922]
7/24/01	Filed response opposing dispositive motion to dismiss parties [4209700-1] served on 7/23/01 (CONFAT) [00-16922] (dg) [00-16922]
8/16/01	Filed Appellees Natural Resources De, et al response opposing motion to dismiss parties [4209700-1] served on 8/16/01 (MOATT) [00-16922] (dg) [00-16922]
8/24/01	Filed Appellants' reply to response to motion to dismiss parties [4209700-1]; served on 8/23/01 (MOATT) [00-16922] (dg) [00-16922]
7/25/02	Filed order (Appellate Commissioner) denying dispositive motion to dismiss parties [4209700-1] setting schedule as follows: Aples and intervenors-aples shall each file an answering brief by 8/30/02; the reply brief is due within 14 days after serv of aples' brief. (MOATT) [00-16922] (dg) [00-16922]

DATE	PROCEEDINGS
9/16/02	Filed original and 15 copies Federal appellees' 53 pages brief; served on 9/13/02 [00-16922] (dg) [00-16922]
11/12/02	Received Appellants' second supplemental excerpts of record on appeal in 1 volumes. (hold & file with reply brief) (dg) [00-16922]
11/22/02	Filed original and 15 copies reply brief, (Informal: no) 55 pages; served on 11/21/02 [00-16922] (dg) [00-16922]
2/18/04	FILED OPINION: AFFIRMED IN PART, VACATED IN PART, all parties to bear their own costs. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. John T. NOONAN, judge; Sidney R. THOMAS; Richard R. CLIFTON, author) FILED AND ENTERED JUDGMENT. [00-16922] (gva) [00-16922]
4/13/04	MANDATE ISSUED [00-16922] (dg) [00-16922]
5/25/04	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 03-1566 filed on 5/18/04. [00-16922] (dg) [00-16922]
10/18/04	Received notice from Supreme Court, petition for certiorari GRANTED on 10/12/04. Supreme Court No. 03-1566 (CASEFILE) [00-16922] (sf) [00-16922]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-F 93-5327 OWW/SSH
HON. OLIVER W. WANGER

FRANCIS A. ORFF, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

The following documents were attached to pleadings filed in the above court.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

Contract No.
14-06-200-495-A
June 5, 1963

CONTRACT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT PROVIDING FOR WATER SERVICE

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P.O. Draft 12/7-1962
Rev. W.O. 1-4-63
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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

Contract No.
14-06-200-495-A

CONTRACT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT PROVIDING FOR WATER SERVICE

THIS CONTRACT, made this 5th day of June, 1963, in pursuance generally of the Act of June 17, 1902 (32 Sta. 388), and acts amendatory thereof or supplementary thereto, all collectively hereinafter referred to as the Federal reclamation laws, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, and WEST-LANDS WATER DISTRICT, hereinafter referred to as the District, a political subdivision of the State of California, duly organized, existing, and acting pursuant to the laws thereof, with its principal place of business in Fresno, California,

WITNESSETH, That:

EXPLANATORY RECITALS

WHEREAS, the United States is constructing and operating the Federal Central Valley Project for the purpose, among others, of furnishing water for irrigation, municipal, domestic, and other beneficial uses; and

WHEREAS, the United States is constructing the San Luis Unit of the Federal Central Valley Project which will be operated and used, in part, for the furnishing of water to the District pursuant to the terms of this contract; and

WHEREAS, the United States is providing an interceptor drain designed to meet the drainage requirements of the San Luis Unit of the Federal Central Valley Project; and

WHEREAS, investigations of the District lands and present water supply indicate that irrigated and irrigable lands within the boundaries of the District are at present in need of additional water for irrigation and certain areas have a potential need of water for irrigation, that ground water underlying the District is seriously depleted and in need of replenishment, and that an additional water supply to meet these present and potential needs can be made available by and through the works constructed and to be constructed by the United States; and

WHEREAS, the District desires to contract, pursuant to the Federal reclamation laws and the laws of the State of California, for the furnishing by the United States of a supplemental water supply from the Project and for drainage service by means of the interceptor drain for which the District will make payment to the United States upon the basis, at the rate, and pursuant to the conditions herein-after set forth; and

WHEREAS, investigations of the streamflow in the Sacramento River, the Trinity River, the American River, the San Joaquin River, and their tributaries indicate that there will be available for furnishing to the District from the San Luis Unit an additional water supply for surface diversion and direct application for irrigation and directly or indirectly to replenish depleted ground waters underlying the District;

NOW, THEREFORE, in consideration of the mutual and dependent covenents herein contained, it is hereby mutually agreed by the parties hereto as follows:

DEFINITIONS

1. When used herein, unless otherwise distinctly expressed, or manifestly incompatible with the intent hereof, the term:

(a) "Secretary" or "Contracting Officer", shall mean the Secretary of the United States Depertmment of the Interior or his duly authorized representative;

(b) "Project" shall mean the Federal Central Valley Project, California, of the Bureau of Reclamation;

(c) "San Luis Unit" shall mean the facilities constructed pursuant to the Act of June 3, 1960 (74 Stet. 156);

(d) "interceptor drain" shall mean the physical works constructed by the United States pursuant generally to the Act of June 3,1960 (74 Stat. 156), in order to meet the drainage requirements of the area served by the ban Luis Unit which have been calculated to be one hundred and fifty thousand (150,000) acre-feet per year at a maximum rate of flow of two hundred and fifty (250) cubic feet per second. Such physical works shall not include those facilities necessary for the collection, conveyance, and discharge of drain water for disposal by the interceptor drain;

(e) "initial delivery date" shall mean the date announced by the Contracting Officer when water from the San Luis Unit first will be available for furnishing by the United States pursuant to this contract;

(f) "year" shall mean the period January 1 through December 31;

(g) "newly irrigated land" shall mean land that has not produced an irrigated crop during the five (5) years immediately previous to the initial delivery date;

(h) "agricultural use" shall mean use of water primarily in the commercial production of agricultural crops or

livestock including domestic use incidental thereto on tracts of land operated in units of two (2) acres or more.

TERM OF CONTRACT

2. This contract shall be effective on the date first hereinabove written and shall remain in effect for a period of forty (40) years commencing with the year in which the earliest initial delivery date of the long-tern contracts for water service from the San Luis Unit shall occur: Provided, That if within five (5) years commencing with the year in which the initial delivery date of this contract occurs the District has not constructed distribution facilities of adequate capacity to serve all of the irrigable lands of the District, this contract shall at the option of the Contracting Officer terminate on the last day of December in said 5th year, except that if such facilities are under construction at the end of said period the Contracting Officer may, at his option, extend said period from ye to year to permit completion of said facilities: Provided further, That under terms and conditions mutually agreeable to the parties hereto, renewals of this contract for furnishing water for agricultural use ma be made for successive periods not to exceed forty (40) years each. The terms and conditions of each renewal shall be agreed upon not later than one (1) year prior to the expiration of the then existing contract: And provided, further, That upon written request by the District of the Secretary not later than one (1) year prior to the expiration of this contract, whenever, account being taken of the amount then credited to the cost of construction of water supply works allocated to irrigation, the retaining amount of costs so allocated which is properly assignable for ultimate return by the District as established by the Secretary of the Interior pursuant to (3) of Section 1 of Public Law 643 (70 Stat. 483) probably can be repaid to the United States within the tern of a contract under subsection (d), Section 9 of the 1939 Reclamation Project Act (53 Stat. 1187), this contract for the furnishing of water for agricultural

use may be converted to a contract under said subsection (d) upon terms and conditions mutually agreeable to the United States and the District.

WATER TO BE FURNISHED TO DISTRICT—
USE OF INTERCEPTOR DRAIN

3. (a) each year for a period of five (5) years, commencing with the year in which the initial delivery date occurs, the t1nnit6d State: shall furnish to the District end the District etch such year shall accept and pay, as provided in Article 6 hereof, for water from the San Luis Unit in the quantities specified in the schedule or any revision thereof submitted by the District its accordance with subdivision (a) of Article 4 hereof for each such year: Provided, That the United Stats shall not be obligated to furnish more than one million eight thousand (1,008,000) acre-feet of water during any such year.

(b) Commencing with the 6th year and continuing through the 15th year the United States shall furnish to the District and the District shall accept and pay for, as provided in Article 6 hereof, four hundred thousand (400,000) acre-feet of water annually: Provided, That the District may at any time or times during the period described by this subdivision, by written notice furnished to the United States in advance, increase the quantity of water the United States shall furnish to the District and the District shall accept and pay for annually during said period, but in no event shall said annual quantity for the 6th year through the year 1979 exceed one million eight thousand (1,008,000) acre-feet and for the period commencing with the year 1980 and extending through the 15th year exceed seven hundred and eighty-three thousand (783,000) acre-feet plus such additional quantity as May be determined pursuant to subdivision (c) hereof. At any time during said period, the submission and approval of a schedule or any revision thereof pursuant to subdivision (a) of Article 4 hereof for water in excess of the quantity the

District is required to accept and pay for during that year shall constitute such a written notice.

(c) The maximum of seven hundred and eighty-three-thousand (783,000) acre-feet of water to be furnished to the District pursuant to subdivisions (b) and (d) hereof has been computed on the premise that by eliminating overdraft a safe yield of two hundred and twenty-five thousand (225,000) acre-feet of water of usable quality will be available each year for pumping within the District from the deep underground beneath what is generally referred to as the Corcoran clay at an estimated average depth of three hundred (300) feet, Prior to January 1, 1980, the United States and the District by joint studies shall review the validity of this estimate based on conditions existing after the initial delivery date. In the event, as a result of such joint studies, the parties determine upon a safe yield in a quantity less than two hundred and twenty-five thousand (225,000) acre-feet, the quantity of water to be furnished annually to the District pursuant to subdivision: and (d) hereof shall then be increased by the difference between send yield of two hundred and twenty-five thousand (225,000) acre-feet and the safe yield as determined by the joint studies; Provided, however, that such increase shall not exceed one hundred and seventeen thousand (117,000) acre-feet.

(d) Commencing the 16th year and each year thereafter during the remainder of the term of this contract, the United States shall furnish to the District for use on its eligible lands and the District eha11 accept and pay for, as provided in Article 6 hereof, seven hundred and eighty-three thousand (783,000) acre-feet, of water plus such additional quantity as may be determined pursuant to subdivision (c) hereof. If in any year during such period the District is unable to so use any part of such total quantity of water, the United States and the District by mutual agreement may reduce, by a quantity equal to that which the District was unable to so use, the

quantity of water which the United States is obligated to furnish and the District is obligated to accept and pay for during the remainder of the term of this contract.

(e) If in any year after the Contracting Officer has approved a schedule or any revision thereof submitted by the District the United States is unable to furnish any portion of the water in the quantities and at the times requested in the schedule and the District does not elect to receive and does not receive such water at other tires during such year, the District shell be entitled to an adjustment as provided in Article 7.

(f) The right to the beneficial use of water furnished to the District pursuant to the terns of this contract and any renewal hereof shall not be disturbed so long as the District shall fulfill all of its obligations under this contract and any such renewal.

(g) Drainage facilities of the District constructed in accordance with Article 13 hereof may be connected to the interceptor drain in such capacity and at such locations as may be mutually agreed upon between the District and the United States.

TIME FOR DELIVERY OF WATER

4. (a) Before January 1 of each year the District shall submit in writing to the Contracting Officer a schedule, subject to the provisions of Article 3 hereof and satisfactory in form and from an operational standpoint to the Contracting Officer, indicating the desired times and quantities for the delivery of all water pursuant to thin contract during such year. The United States shall within the provisions hereof attempt to deliver said water in accordance with said schedule or any revision thereof satisfactory to the Contracting Officer in form and from an operational standpoint submitted by the District within a reasonable time before the desired change of time or quantity, or both, for delivery as nearly as may

be feasible as conclusively determined by the Contracting Officer.

(b) If the District during any month is furnished a quantity of water in addition to that which it has requested for such month in its schedule and accepts such additional water, the District shall be deemed to have revised its schedule to call for such additional water during such month, and the United States shall be deemed to have accepted such revision as satisfactory. As soon thereafter as possible, the District shall submit a revised schedule to the United States for the remaining quantity to be delivered during that year.

(c) The District may at any time or time after the last day of September of any year request water to be furnished in excess of the quantity it is entitled to receive during any such year pursuant to Articles 3 and 8 hereof. Payment for the water so requested at the rate announced by the Contracting Officer pursuant to Article 6 hereof shall be made in advance of delivery of such water. The United States shall furnish such water in accordance with the schedule or any revisions thereof submitted by the District and approved by the Contracting Officer to the extent such water is available and to the extent such furnishing will not interfere with maintenance of or result in detriment to the Project. The quantity of water furnished pursuant to this sub-division shall be deducted from the quantity of water the United States would otherwise be obligated to furnish and the District obligated to accept and pay for during the next succeeding year. The amount paid by the District pursuant to this subdivision shall be deducted from the amount of the payment the District would otherwise be obligated to make during the next succeeding year.

USE OF WATER OUTSIDE THE DISTRICT

5. Water furnished to the District pursuant to this contract shall not be sold or otherwise disposed of for use outside the District without the written consent of the Contracting Officer.

RATE AND METHOD OF PAYMENT FOR WATER—DRAINAGE SERVICE

6. (a) Before December 15 of each year the Contracting Officer shall notify the District in writing of the rate of payment to be made by the District for water which the District is required to accept and pay for during the ensuing year pursuant to the provisions of Article 3 hereof. The rate so announced may not be in excess of Eight Dollars ($8) per acre-foot and shall include a drainage service component of not to exceed Fifty Cents ($0.50) for the interceptor drain and a water service component of not to exceed Seven Dollars and Fifty Cents ($7.50). The United States shall notify the District in writing when the interceptor drain becomes available for service. The drainage service component shall be Included in the rate of payment beginning with the year following the date the District is notified that such service is available.

(b) The District shall make payments to the United Staten each year or the rate fixed as provided in subdivision (a) of this article for the quantity of water which the District is required to accept and pay for during such year pursuant to the provisions of Article 3 hereof. The District shall pay one-half (1/2) of the amount payable for raid voter to be furnished for the year before January 1 and shall pay the remainder of the amount payable for said water at the time the quantity of water furnished to the District equals the quantity for which payment has been made but in no event later than July 1 or such other later date or dates of the respective year as may be specified by the Contracting Officer is a written notice to the District. Water requested by the District in excess of the quantity it is required to accept and pay for that year shall be paid for in full at the time or times such request are made.

(c) In the event the District is unable, fails, or refuses to except delivery of the quantities of water available for delivery to and required to be accepted by it pursuant to this

contract, or in the event the District in any year during the periods described in subdivision (b) and (d) of Article 3 hereof fails to submit a schedule for delivery as provided in subdivision (a) of Article 4 hereof, said inability, failure, or refusal shall not relieve the District of its obligation to pay for such water and the District agreed to make payment therefor in the same manner as if said water had been delivered to and accepted by it in accordance with this contract.

ADJUSTMENTS

7. The amount of any overpayment by the District by reason of the quantity of water actually available for the District during any year, ea conclusively determined by the Contracting Officer, having been less than the quantity of such water which the District otherwise under the provisions of this contract would have been required to receive and pay for shall be applied first to any accrued indebtedness arising out of this contract than due and owing to the United States by the District and any amount of such overpayment than remaining shell, at the option of the District, be refunded to the District or credited upon amounts to become due to the United States from the District under the provisions hereby the ensuing year.

NEED OF DISTRICT FOR MORE WATER THAN AGREED QUANTITY

8. In the event the District in any year requires a quantity of water in addition to the maximum total quantity required to be furnished by the United States and accepted and paid for by the District during such year pursuant to Article 3 hereof, the United States, upon receipt from the District of (1) a written notice requesting such additional water together with a schedule indicating the desired times and quantities for the delivery thereof and (2) payment as provided in Article 6 hereof, shall attempt to deliver such additional water to the District in accordance with said schedule to the extent that

additional water is available for the District, as determined by the Contracting Officer. The amount of any overpayment by the District, by reason of the additional quantity of Nectar furnished to the District pursuant to this article having been less than the additional quantity requested and paid for by the District, shall be applied as provided in Article 7 hereof: Provided, That the inability, failure, or refusal of the District to accept delivery of such additional quantities of water when it is available shall not entitle the District to any adjustment of payment for said water. The furnishing by the United States and acceptance by the District of such additional quantities of water shall neither entitle nor obligate the District to receive such quantities in subsequent years.

POINTS OF DELIVERY—MAINTENANCE OF FLOWS AND LEVELS—MEASUREMENT AND RESPONSIBILITY FOR DISTRIBUTION OF WATER

9. (a) The water to be furnished to the District pursuant to this contract will be delivered at such points on the San Luis Canal as may be mutually agreed upon in writing by the Contracting Officer and the District. Provided however, That in the event the United States shall have reached the construction of the portion of the San Luis Unit which probably will embrace such points and the locations have not been so agreed upon, such points shall be established between mile 33 and mile 101 of the San Luis Canal at locations that in the conclusive determination of the Contracting Officer will best serve the needs of the District.

(b) All water delivered pursuant to this contract shall be measured by the United States at the points of delivery with equipment installed, operated, and maintained by the United States. Upon the request of the District, the accuracy of such measurements will be investigated by the Contracting Officer and any errors appearing therein adjusted.

(c) The United States shall not be responsible for the con-

trol, carriage, handling, use, disposal, or distribution of water which may be furnished at the delivery points established pursuant to subdivision (a) of this article, nor for claim of damage of any nature whatsoever, including but not limited to property damage, personal injury or death, arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such water beyond such delivery points: Provided, That the United States reserves the right to the use of all waste, seepage, and return-flow water derived from water furnished to the District hereunder and which escapes or is discharged beyond the District's boundaries and nothing herein shall be construed as to abandonment or a relinquishment by the United States of the right to use any such water, but this shall not be construed as claiming for the United States any right, as waste, seepage, or return flow, to water being used pursuant to this contract for surface irrigation or underground storage within the District's boundaries by the District or those claiming by, through, or under the District.

(d) The United States may temporarily discontinue or reduce the quantity of water to be furnished to the District or the service of the interceptor drain as herein provided for the purpose of such investigation, inspection, maintenance, repair, or replacement as may be reasonably necessary of any of the Project facilities used in the furnishing of water to the District or any part thereof or to the interceptor drain, but so far as feasible the United States will give the District due notice in advance of such temporary discontinuance or reduction, except in case of emergency, in which case no notice need be given. In the event of any such discontinuance or reduction, the United States will upon the resumption of service approximate delivery of the quantity of water which would have been furnished to the District in the absence of such contingency.

LIMITATIONS ON DELIVERY OF WATER

10. Pursuant to the provisions of the Act of June 3, 1960 (74 Stat. 156), no water provided pursuant to this contract shall be delivered to any water user in the District for the production on newly irrigated lands of any basic agricultural commodity, as defined in the Agricultural Act of 1949, or any amendment thereof, if the total supply of such commodity, as estimated by the Secretary of Agriculture for the marketing year in which the bulk of the crop would normally be marketed will be in excess of the normal supply as defined in Section 301(b)(10) of the Agricultural Adjustment Act of 1938, as amended, unless the Secretary of Agriculture calls for an increase in production of such commodity in the interest of national security.

UNITED STATES NOT LIABLE FOR WATER SHORTAGE

11. (a) There may occur at times during any year a shortage in the quantity of water available for furnishing to the District through and by means of the Project, but in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes. In any year in which there may occur a shortage from any cause, the United States reserves the right to apportion the available water supply among the District and others entitled under the then existing contracts to receive water from the San Luis Unit in accordance with conclusive determinations of the Contracting Officer as follows:

(i) A determination shall be made of the total quantity of water agreed to be accepted during the respective year under all contracts then in force for the delivery of Central Valley Project water by the United States from the San Luis Unit, the quantity so determined being hereinafter referred to as the contractual commitments;

(ii) A determination shall be made of the total quantity of water from the Central Valley Project which is available for meeting the contractual commitments, the quantity so determined being hereinafter referred to as the available supply;

(iii) The total quantity of water agreed to be accepted by the District during the respective year, under Article 3 hereof, shall be divided by the contractual commitments, the quotient thus obtained being hereinafter referred to as the District's contractual entitlement; and

(iv) The available supply shall be multiplied by the District's contractual entitlement and the result shall be the quantity of water required to be delivered by the United States to the District for the respective year, but in no event shall such amount exceed the total quantity of water agreed to be accepted by the District pursuant to Article 3 hereof.

Insofar as determined by the Contracting Officer to be practicable, the United States will, in the event a shortage appears probable, notify the District of such determinations in advance of the irrigation season.

(b) In the event that in any year there is delivered to the District by reason of any shortage or apportionment as provided in subdivision (a) of this article or any discontinuance or reduction of service as set forth in subdivision (d) of Article 9 hereof, less than the quantity of water which the District otherwise would be entitled to receive, there shall be made an adjustment on account of the amounts paid to the United States by the District for water for a said year in manner similar to that provided for in Article 7. To the extent of such deficiency, such adjustment shall constitute the solo remedy of the District or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein.

(c) The United States assumes no responsibility with respect to and does not warrant the quality of the water to be furnished pursuant to this contract: Provided, That the District shall not be obligated to accept and pay for any water which contains in excess of three hundred (300) parts by weight of chloride per one million (1,000,000) parts of water. To the extent that any adjustment is necessary because of the existence of chloride in the water available for furnishing to the District in excess of the quantity herein specified and because of previous payments by the District, such adjustment shall be made in a canner similar to that provided in Article 7 hereof.) No adjustment shall be made hereunder in relation to any water actually furnished to and used by, through, or under the District for any purpose.

MUNICIPAL, INDUSTRIAL, AND DOMESTIC USE OF WATER FURNISHED TO DISTRICT

12. Water furnished in accordance with Article 3 of this contract is for agricultural use. Before water furnished under this contract may be delivered by the District for municipal, industrial, and domestic uses, the parties hereto shall agree upon the measurement of such water, the water service rates payable to the United States on account of the delivery for such purposes, and the time for payment therefor.

DRAINAGE STUDIES AND FACILITIES

13. To aid in determining the source and solution of future potential drainage problems the District shall, in a manner satisfactory to the Contracting Officer, initiate and maintain a program of ground-water observation in order to delineate shallow water table areas and shall furnish annually to the Contracting Officer, during the term of this contract and any renewal thereof, records and analyses of such observations as they relate to potential drainage problems. The District shall

construct such drainage works as are necessary to protect the irrigability of lands within the District.

AGEEED CHARGES A GENERAL OBLIGATION OF THE DISTRICT—TAXABLE LAND

14. The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District. The lands which may be charged with any taxes or assessments under this contract are hereby designated and described as all the lands in the District.

ALL BENEFITS CONDITIONED UPON PAYMENT

15. Should any assessment or assessments required by the terms of this contract and levied by the District against any tract of land or water user in the District and necessary to meet the obligations of the District hereunder be judicially determined to be irregular or void, or should the District or its officers be enjoined or restrained from making or collecting any assessments upon such land or from such water user as provided for herein, then such tract shall have no right to any water furnished to the District pursuant to this contract, and no water made available by the United States pursuant hereto shall be furnished for the benefit of any such lands or water users, except upon the payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existance of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rate and upon the terms and conditions provided for herein is a prerequisite to the right to the use of water furnished to the District pursuant to this

contract, and no irregularity in levying taxes or assessments by the District nor lack of authority in the District, whether affecting the validity of District taxes or assessments or not, shall be held to authorize or permit any water user of the District to demand water made available pursuant to this contract unless charges at the rate and upon the terms and conditions provided for herein have been paid by such water user.

LEVY OF TAXES AND ASSESSMENTS— FIXING OF RATES AND TOLLS

16. The District shall cause to be levied and collected all necessary taxes and assessments and shall use all of the authority and resources of the District to make in full all payments to be made pursuant to this contract on or before the date such payments become due and to meet its other obligations under this contract. The District nay, either or both, require the payment of toll charges or levy assessments for such water supplied hereunder.

REFUSAL OF WATER IN CASE OF DEFAULT

17. No water shall be furnished to the District or by the District to or for the use of any lands or parties therein during any period in which the District may be in arrears in the advance payment of charges accruing under this contract. No water shall be furnished to or by the District pursuant to this contract for lands or parties which are in arrears in the payment to the District of any assessments, rates, tolls, or rental charges of the District levied or established by the District and necessary for the purpose of raising revenues to meet the payment by the District to the United States of the District's obligation under this contract.

PENALTY UPON DELINQUENCY IN PAYMENT

Upon every charge or installment of money required to be paid by the District to the United States pursuant to this

contract which shall remain unpaid after the same shall have become due and payable, there shall be imposed a penalty of one-half (1/2) of one (1) percent per month of the amount of such delinquent charge or installment from and after the date when the same becomes due until paid, and the District hereby agrees to pay said penalty: Provided, That no penalty shall be charged to or be paid by the District unless such delinquency continues for more than thirty (30) days.

DISTRICT TO KEEP BOOKS AND RECORDS AND REPORT CROP AND OTHER DATA

The District shall establish and maintain account and other books and records sufficient to enable it to furnish, insofar as the District is permitted to do so by the laws of the State of California, to the Bureau of Reclamation reports and statements to such an extent and in such manner and form as may be prescribed by the United States as to information pertaining to (1) accounts and financial transactions of the District, insofar as such information pertains to this contract and operations thereunder, and (2) crops raised and agricultural and livestock products produced on the lands within the District, a report thereon to be furnished to the Contracting Officer annually before December 31.

INSPECTION OF BOOKS AND RECORDS

20. Subject to applicable Federal laws and regulations, the proper officers or agents of the District shall have full and free access at all reasonable times to the Project account books and official records of the Bureau of Reclamation, insofar as the same pertain to the matters and things provided for in this contract, with the right at any time during office hours to make copies thereof, and the proper representatives of the United States shall have similar rights with respect to the account books and records of the District.

CHANGES IN ORGANIZATION OF DISTRICT

21. While this contract is in effect no changes shall be made in the District either by inclusions which in the aggregate will total more than twelve thousand five hundred (12,500) acres of land or exclusions which in the aggregate will total more than twelve thousand five hundred (12,500) acres of land, by partial or total consolidation or merger with another district, by proceedings to dissolve, or otherwise, except upon the Contracting Officer's written assent thereto.

TRANSFER OF CARE, OPERATION, AND MAINTENANCE OF SAN LUIS UNIT

22. The United States may transfer the San Luis Unit or a portion thereof to the State of California for care, operation, and maintenance and such transfer shall not affect the rights or obligations of either party to this contract.

LAND NOT TO RECEIVE WATER FURNISHED TO DISTRICT BY UNITED STATES UNTIL OWNERS THEREOF EXECUTE CERTAIN CONTRACTS

23. (a) No water made available pursuant to this contract shall be furnished to any excess lands as defined in Article 25 hereof unless the owners thereof shall have executed valid recordable contracts in form prescribed by the United States, agreeing to the provisions of this article and Articles 24 and 25 of this contract, agreeing to the appraisal provided for in Article 24 hereof and that such appraisal shall be made on the basis of the actual bona fide value of such lands at the date of the appraisal without reference to the construction of the Project, all as hereinafter provided, and agreeing to the sale of such excess lands under terms and condition: satisfactory to the Secretary and at prices not to exceed those fixed as hereinafter provided. No sale of any excess lands shall carry the right to receive water made available pursuant to this contract unless and until the purchase price involved in such sale is unproved by the Contracting Officer and upon proof of fraudulent representation as to the true consideration involved

in such sales the united States may instruct the District by written notice to refuse to furnish any water subject to this contract to the land involved in such fraudulent sales, and the District thereafter shall not furnish said water to such lands until such written notice is withdrawn.

(b) If Project water furnished to the District pursuant to this contract reaches the underground strata of excess land owned by a large landowner, as defined in subdivision (a) of Article 25 hereof, who has not executed a recordable contract and the large landowner pumps such Project water from the underground, the District will not be deemed to have furnished such water to said lands within the meaning of this contract if such water reached the underground strata of the aforesaid excess land as an unavoidable result of the furnishing of Project water by the District to nonexcess lands or to excess lands with respect to which a recordable contract has been executed.

VALUATION AND SALE OF EXCESS LANDS

24. (a) The value of the excess irrigable lands within the District held in private ownership of large landowners as defined in the next succeeding article hereof, for the purposes of this contract, shall be appraised in a manner to be prescribed by the Secretary. At the option of a large landowner, however, the value of such land may be appraised, subject to the approval thereof by the Secretary, by three appraisers. One of said appraisers shall bedesignated by the Secretary and one shall be designated by the District and the two appraisers so appointed shall name the third. If the appraisers so designated by the Secretary and the District are unable to agree upon the appointment of the third, the Presiding Justice of the Fifth District Court of Appeal of the State of California shall be requested to designate the third appraiser.

(b) The following principles shall govern the appraisal:

(i) No value shall be given such lands on account of the existing or prospective possibility of securing water from the Project;

(ii) The value of improvements on the land at the time of said appraisal shall be included therein, but shall also be set forth separately in such appraisal.

(c) The excess land of any large landowner shall be reappraised at the instance of the United States or at the request of said landowner. The cost of the first two appraisals of each tract of excess land shall be paid by the United States. The cost of each appraisal thereafter shall be paid by the party requesting such appraisal.

(d) Any improvements made or placed on the appraised land after the appraisal hereinabove provided for prior to sale of the land by a large landowner shall be appraised in like manner.

(e) Excess irrigable lands sold by large landowners within the District shall not carry the right to receive water made available pursuant to this contract for such lands and the District agrees to refuse to furnish such water to lands so sold until, in addition to compliance with the other provisions hereof, a verified statement showing the sale price upon any such sale shall have been filed with the District and said sale price is not in excess of the appraised value fixed as provided herein.

(f) The District agrees to take all reasonable steps requested by the Contracting Officer to ascertain the occurrence and conditions of all sales of irrigable land of large landowners in the District made subsequent to the execution of this contract and to inform the United States concerning the same.

(g) A true copy of this contract, of each recordable contract executed pursuant to this article and Articles 23 and

25 hereof, and of each appraisal made pursuant thereto shall be furnished to the District by the United States and shall be maintained on file in the office of the District and like copies in such offices of the Bureau of Reclamation as may be designated by the Contracting Officer and shall be made available for examination during the usual office hours by all persons who may be interested therein.

EXCESS LANDS

25. (a) As used herein the term "excess land" means that part of the irrigable land within the District in excess of one hundred and sixty (160) acres held in the beneficial ownership of any single person; or in excess of three hundred and twenty (320) acres held in the beneficial ownership of husband and wife jointly, as tenants in common or by the entirety, or as community property; the term "large landowner" means an owner of excess lands and the term "nonexcess land" means all irrigable land within the District which is not excess land as defined herein.

(b) Each large landowner as a further condition precedent to the right to receive water made available pursuant to this contract for any of his excess land shall:

(i) Before any water is furnished by the District to his excess land, execute a valid recordable contract in form prescribed by the United States, agreeing to the provisions contained in this article and Articles 23 and 24 hereof and agreeing to dispose of his excess land in accordance therewith to persons who can take title thereto as nonexcess land as herein provided and at a price not to exceed the approved, appraised value of such excess land and within a period of ten (10) years after the date of the execution of said recordable contract and agreeing further that if said land is not so disposed of within said period of ten (10) years, the Secretary shall have the power to dispose of said land at the

appraised value thereof fixed as provided herein or such lower price as may be approved by the owner of such land, subject to the same conditions on behalf of such large landowner; and the District agrees that it will refuse to furnish said water to any large landowner other than for his nonexcess land until such owner meets the conditions precedent herein stated;

(ii) Within thirty (30) days after the date of notice from the United States requesting such large landowner to designate his irrigable lands within the District which he desires to designate as nonexcess lands, file in the office of the District, in duplicate, one copy thereof to be furnished by the District to the Bureau of Reclamation, his written designation and description of lands so selected to be nonexcess land and upon failure to do so the District shall make such designation and mail a notice thereof to such large landowner, and in the event the District fails to act within such period of time as the Contracting Officer considers reasonable, such designation will be made by the Contracting Officer, who will mail a notice thereof to the District and the large landowner. The large landowner shall become bound by any such action on the part of the District or the Contracting Officer and the District will furnish said water only to the land so designated to be nonexcess land. A large landowner may with the consent of the Contracting Officer designate land other than that previously designated as nonexcess land: Provided, That an equal acreage of the land previously designated as nonexcess shall, upon such new designation, became excess land thereafter subject to the provisions of this article and Articles 23 and 24 of this contract and shall be described in an amendment of such recordable contract as may have been executed by the large landowner in the same manner as if such land had been excess land at the time of the original designation.

AMENDMENT OF FEDERAL RECLAMATION LAWS

26. In the event that the Congress of the United States repeals the so-called excess-land provisions of the Federal reclamation laws, Articles 23, 24, and 25 of this contract will no longer be of any force or effect, and, in the event that the Congress amends the excess-land provisions or other provisions of the Federal reclamation laws, the United States agrees, at then option of the District, to negotiate amendments of appropriate articles of this contract, all consistently with the provisions of such repeal or amendment.

WATER ACQUIRED BY DISTRICT OTHER THAN FROM THE UNITED STATES

27. (a) The provisions of this contract shall not be applicable to or affect water or water rights now owned or hereafter acquired by the District or landowners within the District other than from the United States. Water furnished pursuant to the terms of this contract may be transported by means of the same distribution facilities as water now available or which way become available to the District or landowners within the District other than pursuant to the terms of this contract if the Contracting Officer determines that such mingling is necessary to avoid a duplication of facilities; and notwithstanding such mingling of water, the provisions of this contract shall be applicable to the quantity of water furnished to the District pursuant to the terms hereof, and such mingling of water shall not in any manner subject to the provisions of this contract the quantity of water acquired by or available to the District or landowners within the District other than from the United States.

(b) With respect to the distribution works or portion's thereof in which mingling is permitted as provided in subdivision (a) hereof, the District:

(i) Will be responsible for the operation and maintenance of separate outlets from the distribution system for

nonexcess and excess lands as defined in Article 23 hereof. At the request of the Contracting Officer the District will be responsible for the installation, operation, and maintenance of water-measuring equipment at delivery points to excess lands and, further, will be responsible for the installation, operation, and maintenance of similar equipment for measuring the water available to the District or landowners within the District other than from the Project, and the Contracting Officer may check and inspect said equipment at any time;

(ii) Agrees that the quantity of water furnished to it by the United States during each 24-hour period will be delivered by the District only to eligible land through the aforesaid outlets to eligible lands. The District shall be deemed to be in breach of this article and Articles 23, 24, and 25 of this contract if at any time there is furnished to all excess lands not covered by recordable contracts and served by the distribution works or portions thereof in which mingling is permitted, a quantity of water which is greater than that which the District or landowners within the District have introduced into said system from the supply available other than pursuant to this contract.

CONTINGENT UPON APPROPRIATIONS OR ALLOTMENT OF FUNDS

28. The expenditure of any money or the performance of any work by the United States hereunder which may require appropriations of money by the Congress or the allotment of funds shall be contingent upon such appropriations or allotment being made. The failure of the Congress so to appropriate funds or the absence of an allotment of funds shall not relieve the District from any obligations then accrued under this contract, and no liability shall accrue to the United States in case such funds are not appropriated or allotted.

OFFICIALS NOT TO BENEFIT

29. (a) No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

(b) No official of the District shall receive any benefit that may arise by reason of this contract other than as a landowner within the District and in the same manner as other landowners within the District.

NOTICES

30. Any notice or announcement which the provisions hereof contemplate shall be given to one of the parties hereto by the other shall be deemed to have been given if deposited in the United States Post Office on the part of the United States in a franked or postage prepaid envelope addressed to the District at its office in Fresno, California, and on the part of the District in a postage-prepaid envelope addressed to the Bureau of Reclamation, United States Department of the Interior, Sacramento, California, or such other address as from time to time may be designated by the Contracting Officer in a written notice to the District: Provided however, That this article shall not preclude the effective service of any such notice or announcement by other means.

ASSIGNMENT-WAIVERS-REMEDIES NOT EXCLUSIVE-OPINIONS AND DETERMINATIONS

31. (a) The provisions of this contract shall apply to and bind the successors and assigns of the respective parties, but no assignment or transfer of this contract or any part thereof or interest therein shall be valid until and unless approved by the United States.

(b) Any waiver at any time by either party to this contract of its rights with respect to a default, or any other matter

arising in connection with this contract, shall not be deemed to be a waiver with respect to any subsequent default or matter.

(c) Nothing contained in this contract shall be construed as in any manner abridging, limiting, or depriving the United States of any means of enforcing any remedy, either at law or in equity, for the breach of any provisions hereof which it would otherwise have.

(d) Where the terms of this contract provide for matters being done to the satisfaction of a representative of either party hereto, or for action to be based upon the opinion or conclusive determination of such a representative of either party hereto, such terms are not intended to be and shall never be construed as permitting such satisfaction, opinion, or determination of such a representative of either party to this contract to be arbitrary, capricious, or unreasonable; and the District, notwithstanding any other provisions of this contract, expressly reserves the right to relief from and appropriate adjustment for any such arbitrary, capricious, or unreasonable satisfaction, opinion, or determination

ASSURANCE RELATING TO VALIDITY OF CONTRACT

32. (a) Promptly after the execution and delivery of this contract the District shall file and prosecute to a final decree, including any appeal therefrom to the highest court of the State of California, in a court of competent Jurisdiction a special proceeding for the judicial examination, approval, and confirmation of the proceedings had for the organization of the District and the proceedings of the District Board of Directors and of the District leading up to and including the making of this contract and the validity of the provisions thereof; and this contract shall not be binding on the United States until said District organization, proceedings, and contract shall have been so confirmed by a court of competent

jurisdiction or pending appellate action in any court if ground for appeal be laid: Provided, That nothing herein contained shall require the District to assume the responsibility of prosecuting judicial review beyond the highest court of the State of California.

(b) This contract shall be indivisible for purposes of validation and shall not be binding on the United States or the District unless validated in each and all of its term and conditions as executed by the parties.

IN WITNESS WHEREOF, the parties hereto have executed this contract the day and year first above written.

THE UNITED STATES OF AMERICA

/s/ [ILLEGIBLE]

By [ILLEGIBLE]
Regional Director, Region 2
Bureau of Reclamation

WESTLANDS WATER DISTRICT

/s/ [ILLEGIBLE]
By [ILLEGIBLE]
President

(SEAL)—Affixed

Attest:

/s/ [ILLEGIBLE]
Secretary

RESOLUTION NUMBER 121-62

WHEREAS, Westlands Water District and the Bureau of Reclamation, United States Department of the Interior, have been negotiating for the execution of a contract under the terms of which the United States would provide water service to this District from the San Luis Unit of the Central Valley Project; and

WHEREAS, the Bureau of Reclamation has submitted to Westlands Water District a draft of contract marked "R.O. Draft 12/7-1963" under the terms of which such service would be provided; and

WHEREAS, This District is in serious need of a supplemental water supply; and

WHEREAS, this District was formed in contemplation of the acquisition of a supplemental water supply from the San Luis Unit of the Central Valley Project; and

WHEREAS, said draft of contract marked "R.O. Draft 12/7-1962" is considered by this Board to be satisfactory and that it would be in the best interests of this District to execute said contract,

NOW, THEREFORE, BE IT RESOLVED, that the draft of proposed contract marked "R.O. Draft 12/7-1962" between the United States and Westlands Water District be, and it is, hereby approved.

BE IT FURTHER RESOLVED, that the Manager Chief Counsel of this District be, and he is, hereby authorized and instructed to take the necessary steps to complete the statutory and other procedures required to be met prior to the execution of said contract; and

BE IT FURTHER RESOLVED, that, upon the approval by the Secretary of the Interior of said form of contract and after approval by the California Districts Securities Commission and the voters of this District, the President and the Secretary

of this District be, and they are, hereby authorized to execute said contract for and on behalf of Westlands Water District.

AYES: GIFFEN, DIEKER, BAKER, BENSON, van LOBEN SELS -

NOES: NONE

ABSENT: ROBINSON, THOMAS

STATE OF CALIFORNIA)
) ss
COUNTY OF FRESNO)

STEWART P. SMITH does hereby certify that he Is the duly appointed qualified and acting Secretary of WEST-LANDS WATER DISTRICT, a public district organized under the laws of the State of California with its offices at Fresno California; that the foregoing Resolution Number 121-62 was duly and results adopted by the Board of Directors of WESTLANDS WATER DISTRICT at a meeting of said Board of Directors duly called and held on the 10th day of December, 1962 at the offices of said WEST-LANDS WATER DISTRICT at Which a quorum of said Directors was present and acting; and that said Resolution is still in full force and affect.

DATED: January 10, 1963

/s/ Stewart P. Smith
STEWART P. SMITH
Secretary, Westlands Water District

(SEAL)

RESOLUTION No. 125-63

WHEREAS Westlands Water District has heretofore approved a proposed draft of contract marked R.O. Draft 12/7-1962, for water service to this District from the San Luis Unit of the Central Valley Project; and

WHEREAS, said form of contract was submitted to the Secretary of the Interior for approval on behalf of the United States; and

WHEREAS the President of the United States and the Secretary of the Interior have approved said draft of contract subject to certain amendments, which amendments are incorporated In a draft of said contract marked R.O. Draft 12/7-1962, Rev. W.O. 1-4-63. Rev. V.O. 1-21-63, and

WHEREAS, said draft of contract, as mended, is satisfactory to Westland Water District; and

WHEREAS, said draft of contract, under the provisions of Section 35885 of the Water Code of California requires the approval of the California Districts Securities Commission prior to execution.

NOW, THEREFORE, BE IT RESOLVED, that the Board of Directors of Westlands Water District do, and it does, hereby approve, for execution, the proposed contract between the United States of America and the Westlands Water District, which contract is marked R.O. Draft 12/7-1962, Rev. V.O. 1-4-63, Rev. W.O. 1-21-63.

BE IT FURTHER RESOLVED, that the California Districts Securities Commission be, and it is, hereby requested to approve said form of contract marked R.O. Draft 12/7-1962, Rev. W.O. 1-4-63, Rev. W.O. 1-21-63.

BE IT FURTHER RESOLVED, that Ralph M. Brody, Manager Chief Counsel for this District be, and he is, hereby authorized and directed to petition said California Districts Securities Commission for such approval and to execute all necessary documents for and on behalf of Westlands Water District required for obtaining such approval of the California Districts Securities Commission.

AYES: GIFFEN, DIEKER, BAKER, BENSON, ROBINSON, THOMAS, van LOBEN SELS

NOES: NONE

ABSENT: NONE

STATE OF CALIFORNIA)
) ss
COUNTY OF FRESNO)

STEWART P. SMITH does hereby certify that he is the duly appointed, qualified and acting Secretary of WEST-LANDS WATER DISTRICT, a public district organized under the laws of the State of California with its offices at Fresno, California; that the foregoing Resolution Number 125-63 was duly end regularly adopted by the Board of Directors of WESTLANDS WATER DISTRICT at a meeting of said Board of Directors duly called and held on the 11th day of February, 1963 at the offices of said WESTLANDS WATER DISTRICT at which a quorum of said Directors was present end acting; and that said Resolution is still in full force and effect.

DATED: June 5, 1963

/s/ Stewart P. Smith
STEWART P. SMITH
Secretary, Westlands Water District

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

Contract No. 14-06-200-2020A
April 1, 1965

CONTRACT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT PROVIDING FOR THE CONSTRUCTION OF A WATER DISTRIBUTION AND DRAINAGE COLLECTOR SYSTEM

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

Contract No. 14-06-200-2020A

CONTRACT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT PROVIDING FOR THE CONSTRUCTION OF. A WATER DISTRIBUTION AND DRAINAGE COLLECTOR SYSTEM

THIS CONTRACT, made this 1st day of, April, 1965, in pursuance generally of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all collectively hereinafter referred to as the Federal reclamation laws, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, and WESTLANDS WATER DISTRICT, hereinafter referred to as the District, a political subdivision of the State of California, duly organized, existing, and acting pursuant to the laws thereof, with its principal place of business in Fresno, California,

WITNESSETH, That:

EXPLANATORY RECITALS

WHEREAS, the United States is constructing and operating the Federal Central Valley Project for the purpose, among others, of furnishing water for irrigation, municipal, domestic, and other beneficial uses; and

WHEREAS, the United States will furnish Federal Central Valley Project water to the District pursuant to Contract No. 14-06-200-495-A, dated June 5, 1963, or as it may hereafter be amended, renewed, or extended; and

WHEREAS, the District, in order to utilize its groundwater supply and the water supply made available under the

water service contract and such future contracts as may be made between the United States and the District, desires that a water distribution and drainage collector system be constructed for the District by the United States acting by and through the Bureau of Reclamation, United States Department of the Interior, pursuant to the Federal reclamation laws; and

WHEREAS, the District has constructed a portion of the water distribution facilities required for the operation of the distribution system; and

WHEREAS, it is desirable and in the interest of the United States and the District that the facilities constructed by the District for water distribution be acquired by the United States for integration with the distribution system; and

WHEREAS, the United States is willing to undertake the construction of the aforementioned water distribution and drainage collector system under the conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the mutual and dependent covenants herein contained, it is agreed as follows:

DEFINITIONS

1. When used herein, unless otherwise distinctly expressed, or manifestly incompatible with the intent hereof, the term:

(a) "Secretary" or "Contracting Officer" shall mean that Secretary of the United States Department of the Interior or his duly authorized representative;

(b) "Project" shall can the Federal Central Valley Project, California, of the Bureau of Reclamation;

(c) "year" shall mean a calendar year;

(d) "distribution system" shall mean a water distribution and lateral system, primarily of closed pipe, including

facilities for the integration of ground with surface water supplies, and a drainage collector system and related facilities to be constructed under the terms of this contract;

(e) "water service contract" shall mean the contract of June 5, 1963, No. 14-06-200-495-A, or as it may hereafter be amended, renewed, or extended, between the United States and the District providing for water service to the District from the San Luis Unit of the Central Valley Project.

CONSTRUCTION OF DISTRIBUTION SYSTEM AND LIMIT OF EXPENDITURES THEREFOR

2. (a) To the extent that funds may now or hereafter be available by appropriation and allocation for the purposes set forth herein, the United States will expend toward construction of a distribution system (generally as illustrated in Exhibit A) a sum not in excess of One Hundred Fifty-Seven Million Forty-Eight Thousand Dollars ($157,048,000), or so much thereof as the Contracting Officer deems necessary for the completion of the distribution system. Said distribution system will not include the San Luis Canal or the San Luis Canal right-of-way except facilities and structures for handling water after delivery thereof to the District at the delivery points established pursuant to the water service contract. The United States and the District will exert their best efforts to expedite the completion of such features.

(b) The distribution system will be constructed so as to provide facilities for the delivery of water from the San Luis Canal to such units of a total of approximately 400,000 acres of irrigable land as mutually agreed upon by the District and the Contracting Officer prior to the award of the construction contract for the area to be served.

(c) Facilities to be constructed will be separated into construction groups. The general type and layout of the distribution system and the portions thereof to be included in each construction group shall be subject to review and approval by the District evidenced by a resolution of the District's Board of Directors prior to the commencement of construction of each such construction group of the distribution system. Construction group 1 shall include substantially all of the water distribution facilities, drainage collector facilities, and works for the integration of ground with surface water, all as initially required to serve the area substantially as delineated on Exhibit Construction groups 2 and 3 shall include added portions of the distribution system on which subsequent construction is started no later than June 30, 1974, and June 30, 1979, respectively, except as provided in Article 4(b) hereof. Changes in capacity, specifications, locations, lengths and alignments, as may in the opinion of the Contracting Officer be expedient, economical, necessary, or advisable to the extent that such changes do not substantially change the basic character or service capability of the facilities theretofore approved by the District, may be made during the progress of the work after consultation with the District.

(d) The United States and the District shall cooperate closely in the preparation of the plans, designs, specifications, method of contracting, and reviews of abstracts of bids for construction of the distribution system and District representatives may at any time consult with the Contracting Officer or his designated representatives on such matters.

(e) Quarterly progress reports on design and construction, including costs thereof, in the form normally used by the United States will be furnished to the District. By reports and joint conferences, the District shall be kept informed of the progress on and costs of the facilities. The United States will furnish other related information in its possession as may be requested by the District.

The United States and the District will conduct cost auditing examinations and conferences as may be requested by the District.

DISTRICT FACILITIES TO BE ACQUIRED BY THE UNITED STATES

3. The United States shall acquire for the construction of the distribution system such water distribution pipeline facilities, including sublaterals constructed by the District as are usable as an integral part of the distribution system, which pipeline extends from a point approximately two (2) miles west of the easterly boundary of the District along Adams Avenue to the right-of-way of the San Luis Canal. The amount which the United States shall pay for such facilities, including rights-of-way, shall not exceed the lesser of (a) the cost which the United States would have incurred if it had constructed a line and sublaterals to serve the same area, or (b) the cost incurred by the District in the construction and operation and maintenance of said facilities less the amount attributable to such facilities received from the United States in payment of water transportation for preconsolidation purposes pursuant to Contract No. 14-06-200-316-A.

PAYMENT BY DISTRICT

4. (a) The District shall repay to the United States the actual cost of the distribution system constructed and acquired pursuant to Articles 2 and 3 hereof, but in no event shall the total cost incurred by the United States for the distribution system exceed One Hundred Fifty-Seven Million Forty-Eight Thousand Dollars ($157,048,000).

(b) The construction cost of construction group 1 described in subdivision (c) of Article 2 shall be paid by the District in eighty (80) successive semiannual installments payable on January 1 and July 1 of each year beginning in the year following completion of said group to the point where all the laterals and sublaterals of such construction group and

substantially all other facilities for such construction group can be put in service for the delivery of eater, as announced in writing by the. Contracting Officer pursuant to Article 24. Each of the first ten (10) payments shall be for one one-hundred and sixtieth (1/160th) of the construction cost of said group 1 and each of the remaining seventy (70) payments shall be for one-seventieth (1/70th) of the remainder of the cost. The construction cost of subsequent construction groups shall be paid in eighty (80) successive equal semiannual installments payable on January 1 and July 1 of each year. The first installment with respect to construction groups 2 and 3 shall become due and payable on January 1 of the year following completion of construction of the respective construction group to the point where all the laterals and sublaterals of such construction group and substantially all other facilities for such construction group can be put in service for the delivery of water, as announced in writing by the Contracting Officer pursuant to Article 24. If the actual cost of any group shall not have been determined by the Contracting Officer when the first construction obligation installment for such group shall have become due hereunder, he shall announce the estimated construction cost. Such estimated construction cost shall govern the amount of the installments herein referred to until such time as the actual construction cost can be determined and a statement thereof furnished to the District. When notice of the actual construction cost has been given to the District, installments coming due thereafter from the District shall be adjusted to reflect any difference between the estimated cost and the actual cost of construction. If after June 30, 1979, it is determined that facilities to complete the distribution system, pursuant to Article 2 hereof, are required by the District in addition to the facilities in construction group 3, such additional facilities may with the consent of the District be constructed by the United States and their cost added to the unpaid balance of the cost of construction group 3. The

remainder of payments to be made by the District for construction group 3 shall be adjusted to cover the total cost of the additional facilities within the repayment period for that group.

(c) The Contracting Officer may at any time in his discretion, upon request of the District evidenced by a certified copy of a resolution of the Board of Directors of the District, provide for dates upon which semiannual installments of the construction cost shall become due and payable other than and in lieu of those dates fixed for the payment of such semiannual installments as provided in subdivision (b) of this article.

(d) When the Contracting Officer notifies the District in writing that total expenditures have been made to the limit determined pursuant to subdivision (a) of this article or so such thereof as the Contracting Officer considers necessary and useful for the construction of the distribution system, the distribution system shall also be deemed to have been completed within the meaning of this contract.

ACQUISITION OF LANDS AND INTERESTS IN LANDS

5. The United States will invoke all legal and valid reservations of rights-of-way under acts of Congress, or otherwise reserved or held by it available for the purposes of this contract. The United States reserves the right where rights-of-way are thus invoked to reimburse the owner of the servient lands for the value of the lands and the value of improvements which may be destroyed, and the District agrees that the United States may include such disbursement together with any others that pay be authorized the Congress in the cost of the distribution system to be repaid by the District. The District agrees to convey to the United States, on the request of the Contracting Officer, without cost, the unencumbered fee simple title to any and all lands owned by it, or perpetual easements therein, required for right-of-way,

construction, or other related purposes. Where rights-of-way are required for works herein agreed to be constructed by the United States and such rights-of-way are not reserved to the United States under acts of Congress or otherwise and the lands over which such rights-of-way are required are not then owned by the District, then the District upon request of the United States agrees that it will acquire such lands or perpetual easements therein, using in connection therewith such forms of contracts, deeds, and other necessary papers as may be required by the United States, and purchases shall be only at prices that are satisfactory to the Contracting Officer. Title may be taken directly in the name of the United States or by the District and then transferred to the United States and on procuring execution of the necessary contracts, deeds, and other papers they shall be transmitted by the District to the United States by whom payment will be made after title has been found satisfactory to the Contracting Officer. Expenses incurred by the District in connection with acquisition provided for herein, to the extent approved by the Contracting Officer, shall be paid to the District on the basis of quarterly statements submitted at the close of each quarter of the year and shall be chargeable as part of the construction costs.

OPERATION AND MAINTENANCE OF COMPLETED PORTIONS OF SYSTEM

6. Whenever, prior to the transfer of operation and maintenance of the distribution system, or any portion thereof, to the District as provided in Article 7 hereof, the Contracting Officer determines that any portion or portions of the system being constructed by the United States may be utilized for its intended purposes without interfering with the construction of the remainder of the distribution system, he will so notify the District in a written notice stating the period of availability and the estimated cost to the United States of supervising the operating and maintaining of such portion or portions of the system by the District during such period. If the District

desires that such portion or portions of the system so be utilized, it shall give the Contracting Officer written notice thereof and shall make payment in advance to the United States of said estimated cost of said supervision of operation and maintenance. Thereupon the District will at its own expense operate and maintain said portion or portions of the system under supervision of the United States. The United States at any time may terminate the use of said portion or portions of the system if the Contracting Officer determines that such use is interfering or will interfere with the construction of the distribution system. The District shall contribute all labor and materials toward the operation and maintenance of the portion or portions of the system being utilized. If the actual cost to the United States of operating and maintaining said portion or portions of the system exceeds the estimated cost paid in advance by the District, the District shall pay the difference upon receipt of a written notice thereof. If said actual cost is less than said estimated cost, the difference shall at the option of the District either be credited upon future payments due to the United States or be refunded to the District.

TRANSFER OF OPERATION AND MAINTENANCE TO DISTRICT—UNITED STATES TO BE HELD HARMLESS

7. (a) Upon completion of construction of each construction group of the distribution system or such earlier date as may be agreed upon by the Contracting Officer and the District, the District shall accept the care, operation, and maintenance of such group or any part thereof described in a transfer notice to be furnished to the District by the Secretary. The District, without expense to the United States, shall care for, operate, and maintain such transferred works in full compliance with the terms of this contract and the water service contract, and in such manner that said transferred works shall remain in good and efficient condition. The District also agrees, upon the effective date of the transfer

notice, to assume all obligations of the United States under any contract or contracts relating to the crossing of the distribution system facilities in, over, along, or across land or rights-of-way of public utilities, the State of California, or agencies thereof. The District will use all proper methods to secure the economical and beneficial use of the water delivered by means of the distribution system.

(b) At any time prior to full payment of the construction costs that the Contracting Officer determines that the District has not cared for, operated, maintained, or delivered water from transferred works in the manner as aforesaid, the United States may assume the control of the distribution system and appurtenant works and all equipment, materials, and supplies used, acquired for use, and useful in the operation of the distribution system, and shall operate and maintain such works, and the District hereby agrees to surrender possession of said works. The works so taken back for operation and maintenance by the United States may be retransferred to the District upon furnishing the District ninety (90) days written notice of intention to retransfer. If any works are taken back by the United States at such time that funds for the operation and maintenance cannot be advanced in accordance with the procedure sat forth in Article 8 hereof, the District hereby agrees, on the basis of statements of estimates to be submitted by the Contracting Officer, to advance sufficient funds to provide for the operation and maintenance of such works until such funds can be provided under the procedure set forth as aforesaid in Article 8 hereof.

(c) No substantial change in any of the transferred works shall be made by the District without first obtaining written consent of the Contracting Officer. The District shall make promptly any and all repairs to the transferred works which in the opinion of the Contracting Officer are deemed necessary for the proper care, operation, and maintenance of the same. If at any time in the opinion of the Contracting Officer any

part of the transferred works shall from any cause be in a condition unfit for service, he may order that the water be turned out and shut off from that part of the distribution system until in his opinion such property is put in proper condition for service. In the event the District neglects or fails to make such repairs, the United States may cause the repairs to be made and may charge the cost thereof to the District, which charge the District shall pay in the manner provided in Article 9 hereof. The District shall provide for the collection of sufficient operation and maintenance or toll charges to pay all such bills to the United States within the time stated herein in addition to providing the necessary funds to meet the other obligations of the District.

(d) The Contracting Officer may from time to time cause an appropriate inspection of the transferred works and of the books and records of the District to be made to ascertain whether the requirements of this contract are being satisfactorily performed by the District. Such inspections may include physical inspection of all properties and audit of the books and records of the District. Any such inspection or audit shall, except in case of emergency, be made after written notice to the District and the actual expense thereof shall be paid by the District to the United States in the manner provided in Article 9 hereof.

(e) No liability shall accrue against the United States and its officers and employees because of damages arising out of or in any manner connected with the care, operation, and maintenance of the distribution system by the District. The District hereby releases the United States and agrees to hold it free and harmless and to indemnify it from all damage claims that may result from operation and maintenance of transferred works.

ESTIMATED COST OF OPERATION AND MAINTENANCE TO BE PAID IN ADVANCE

8. (a) During the time that the distribution system or any part thereof is being operated by the United States as provided in Article 7(b) hereof, the District will pay in advance to the United States not later than January 1, upon estimates therefor to be furnished by the United States on or before September 1 next preceding, the estimated cost of operation and maintenance for such year. The District in addition shall contribute such labor and materials toward the operation and maintenance of the distribution system or any portion thereof as may be requested by the Contracting Officer. The surplus of any amount so advanced by the District for operation and maintenance by the United States during any year shall be credited on future estimated cost of operation and maintenance by the United States.

(b) Whenever in the opinion of the Contracting Officer the amounts available from payments made by the District of the estimated annual operation and maintenance charges will be inadequate to operate and maintain the distribution system properly to the end of any year, he may give written notice to the District, hereinafter referred to as the supplemental operation and maintenance charge notice, stating therein the amount of additional advance payment of funds required for such operation and maintenance, and the District shall pay the amount thereof on or before the dates specified in such supplemental operation and maintenance charge notice.

(c) Any amount of said operation and maintenance payments by the District for any year remaining unexpended and unobligated in the possession of the United States on the effective date of retransfer of the distribution system, in whole or in part, to the District for care, operation, and maintenance, in accordance with Article 7(b) hereof, shall be refunded to the District.

(d) To the extent that the distribution system is operated and maintained by the United States, there shall be included as a part of the operation and maintenance costs such items. for administration, supervision, inspection, replacement, and general expenses as properly are chargeable to such work in the opinion of the Contracting Officer.

DISTRICT TO PAY CERTAIN MISCELLANEOUS COSTS RELATING TO TRANSFERRED WORKS

9. In addition to the other payments to be made by the District, as provided by this contract, the District shall pay to the United States on or before April 1 of the year following that in which the same shall have been incurred and a statement thereof furnished by the United States, the following costs:

(i) Such items of cost incurred by the United States in connection with the distribution system for administration, supervision, and inspection during the time the distribution system is operated and maintained by the District and for the period covered by the statement; and

(ii) The cost of repairs to transferred works made by the United States as provided in Article 7 hereof.

COMPUTATION OF COSTS

10. The actual construction cost of the distribution system to be repaid to the United States by the District shall embrace all expenditures by the United States of whatsoever kind in connection with, growing out of, or resulting from work performed in connection with the distribution system, including but not limited to the cost of labor, material, equipment, engineering and legal work, superindence, administration and overhead, rights-of-way, property, whether purchased from the District or others, and damage of all kinds, and shall include all sums expended by the Bureau of Reclamation in surveys and investigations in connection with the distribution

system, both prior to and after the execution of this contract, and the expense of all soil investigations and other preliminary work. The determination of what costs are properly chargeable hereunder and the amount thereof shall be made conclusively by the Contracting Officer.

ACCUMULATION AND USE OF RESERVE FUND

11. (a) General. Commencing with the year following the year of completion of construction group 1 as provided in subdivision (c) of Article 2 hereof and continuing until all construction charge obligations to be paid to the United States under this contract are paid in full, the District shall accumulate and maintain a reserve fund, which will be available for use in the manner, for the purposes, and in the circumstances hereinafter set forth as follows:

(i) During such time as the distribution system constructed hereunder is operated and maintained by the United States in accordance with the provisions herein, the reserve fund shall be available for use by the United States for the purposes specified in this article;

(ii) At the option of the District, the reserve fund may be invested to the extent permitted by law, provided that such reserve fund may be made available within a reasonable time to meet the expenses for the purposes for which it was accumulated; and

(iii) From time to time, as requested by either party to this contract, the reserve fund provisions may be reconsidered and changed by mutual agreement of the parties.

(b) Reserve Fund. The reserve fund shall consist of annual deposits by the District of not lees than Fifty Thousand Dollars ($50,000) to a special account created by the District for the purpose. Such annual deposits shall continue until the amount in the reserve fund is not less than Two

Hundred Fifty Thousand Dollars ($250,000). Whenever said reserve fund is reduced below Two Hundred Fifty Thousand Dollars ($250,000) by expenditures therefrom, it shall be restored to not less than the amount set forth above by the accumulation of annual deposits at a minimum rate of twenty percent (20%) of that amount. Expenditures shall be made from such fund only for meeting extraordinary costs of care, operation, maintenance, repair, and replacement of the distribution system including Project features operated and maintained by the District, and for care, operation, and maintenance during periods of special stress, such as may be caused by drought, hurricane, storms or other emergencies.

AGREED CHARGES A GENERAL OBLIGATION OF THE DISTRICT—TAXABLE LANDS—LEVY OF TAXES AND ASSESSMENTS—FIXING OF RATES AND TOLLS

12. (a) The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District. The lands which may be charged with any taxes or assessments under this contract are hereby designated and described as all the lands in the District.

(b) The District shall cause to be levied and collected all necessary taxes and assessments and will use all of the authority and resources of the District to make in full all payments to be made pursuant to this contract on or before the date such payments become due and to meet its other obligations hereunder. The District may, either or both, require the payment of toll charges or levy assessments to meet its obligations hereunder.

ALL BENEFITS CONDITIONED UPON PAYMENT

13. Should any assessment or assessments levied by the District against any tract of land or water user in the District

and required to meet the obligations of the District under this contract be judicially determined to be irregular or void, or should the District or its officers be enjoined or restrained from making or collecting any assessments upon such land or from such water user as provided for herein, then such tract or water user shall have no right to any of the benefits of this contract, and no use shall be made of the distribution system for the benefit of any such lands or water user, except upon the payment by the landowner of his assessment or a toll charge for the use of said distribution system, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water user invoiving service from said distribution system shall provide that such use shall be subject to the terms of this contract. It is further agreed that the payment of charges at the rates and upon the terms and conditions provided for herein is a prerequisite to the right to service from said distribution system, and no irregularity in levying taxes or assessments by the District nor lack of authority in the District, whether affecting the validity of District taxes or assessments or not, shall be held to authorize or permit any water user of the District to demand or receive service made available pursuant to this contract unless charges at the rates and upon the terms and conditions provided for herein have been paid by such water user.

REFUSAL OF SERVICE IN CASE OF DEFAULT

14. No service from the distribution system shall be furnished to the District or by the District to or for the use of any lands or parties therein during any period in which the District may be in arrears in the advance and other payments of operation and maintenance costs or for more than twelve (12) months in the payment of construction charges accruing under this contract. No water made available pursuant to the water service contract and no service from the distribution system shall be furnished to or by the District to any lands or

parties which are in arrears in the payment to the District of any assessments, rates, tolls, or other charges levied or established by the District for the purpose of providing revenues to meet payments by the District to the United States pursuant to Articles 7 and 9 hereof or are in arrears for more than twelve (12) months in similar payment to the District for the purpose of providing revenues to meet payment by the District to the United States pursuant to Article 4 hereof.

PENALTY FOR DELINQUENCY IN PAYMENT

15. The District shall pay a penalty on installments or charges which become delinquent computed at the rate of one-half of one percent per month of the amount of such delinquent installments or charges for each day from the date of such delinquency until paid: Provided, That no penalty shall be charged to the District unless such delinquency continues for more than thirty (30) days.

BOOKS, RECORDS, AND REPORTS

16. The District shall establish and maintain accounts and other books and records pertaining to its financial transactions, land use, crop production, water supply, water use, changes to the distribution system, and to such other matters as the Contracting Officer may require. Reports thereon shall be furnished to the United States in such form and on such date or dates as may be required by the Contracting Officer. Each party shall have the right, during office hours, to examine and make copies of the other party's books and official records relating to matters covered by this contract.

CHANGES IN ORGANIZATION OF DISTRICT

17. While this contract is in effect no change, except as provided for in the water service contract, shall be made in the District either by inclusion or exclusion of lands, by partial or total consolidation or merger with another district,

by proceedings to dissolve, or otherwise, except upon the Contracting Officer's written assent thereto.

TITLE TO REMAIN IN THE UNITED STATES

18. Title to the distribution system constructed by the United States pursuant to this contract shall be and remain in the name of the United States until otherwise provided for by the Congress, notwithstanding the transfer hereafter of any of such works to the District for operation and maintenance.

TRANSFER OF CARE, OPERATION, AND MAINTENANCE OF SAN LUIS UNIT

19. The United States may transfer the San Luis Unit of the Central Valley Project or any portion thereof, other than distribution system, to the State of California for care, operation, and maintenance and such transfer shall not affect the rights or obligations of either party to this contract.

LAND INELIGIBLE TO RECEIVE WATER UNDER THE WATER SERVICE CONTRACT NOT TO RECEIVE WATER SERVICE THROUGH THE DISTRIBUTION SYSTEM

20. No water shall be delivered through the distribution system to any lands or persons not eligible under the terms of Articles 23, 24, and 25 of the water service contract to receive water made available pursuant to that contract.

CONTINGENT UPON APPROPRIATIONS OR ALLOTMENT FUNDS

21. The expenditure of any money or the performance of any work by the United States herein provided for which may require appropriations of money by the Congress or the allotment of funds shall be contingent upon such appropriations or allotment being made. The failure of the Congress so to appropriate funds or the absence of an allotment of funds shall not relieve the District from any obligations then

accrued under this contract, and no liability shall accrue to the United States in case such funds are not appropriated or allotted.

RULES AND REGULATIONS

22. The Secretary reserves the right to make, after consultation with the District, such rules and regulations consistent with the provisions of this contract, the laws of the United States and State of California, and to add to and modify them as may be deemed proper and necessary to carry out this contract, and to supply necessary details of its administration which are not covered by express provisions of this contract. The District agrees to observe such rules and regulations.

OFFICIALS NOT TO BENEFIT

23. (a) No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

(b) No official of the District shall receive any benefit that may arise by reason of this contract other than as a landowner within the District and in the same manner as other landowners within the District.

NOTICES

24. Any notice or announcement which the provisions hereof con-template shall be given to one of the parties hereto by the other shall be deemed to have been given if deposited in the United States Post Office on the part of the United States in a franked or postage-prepaid envelope addressed to the District at its office in Fresno, California, and on the part of the District in a postage-prepaid envelope addressed to the Bureau of Reclamation, United States Department of the Interior, Sacramento, California, or such other address as from time to time may be designated by the Contracting Officer in

a written notice to the District: Provided, however, That this article shall not preclude the effective service of any such notice or announcement by other means.

ASSIGNMENT—WAIVERS—REMEDIES NOT EXCLUSIVE

25. (a) The provisions of this contract shall apply to and bind the successors and assigns of the respective parties, but no assignment or transfer of this contract or any part thereof or interest therein shall be valid until and unless approved by the United States.

(b) Any waiver at any time by either party to this contract of its rights with respect to a default, or any other matter arising in connection with this contract, shall not be deemed to be a waiver with respect to any subsequent default or matter.

(c) Nothing contained in this contract shall be construed as in any manner abridging, limiting, or depriving the United States or the District of any means of enforcing any remedy, either at law or in equity, for the breach of any of the provisions hereof which it would otherwise have.

DETERMINATIONS

26. (a) Where the terms of this contract provide for action to be based upon the opinion, or determination of either party to this contract, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations.

(b) In the event the District questions any factual determination made by any representative of the Secretary as required in the administration of this contract, any findings as to the facts in dispute thereafter made by the Secretary shall be made only after consultation with the District's board of directors.

(c) Except as otherwise provided herein, the Secretary's decision on all questions of fact arising under this contract shall be conclusive and binding upon the parties hereto.

COVENANT AGAINST CONTINGENT FEES

27. The District warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon as agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling-agencies maintained by the District for the purpose of securing business. For breach or violation of this warranty the United States shall have the right to annul this contract without liability or in its discretion to add to the contract repayment obligation or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

ASSURANCE RELATING TO VALIDITY OF CONTRACT

28. Promptly after the execution and delivery of this contract, the District shall file and prosecute to a final decree, including any appeal therefrom to the highest court of the State of California, in a court of competent jurisdiction a special proceeding for the judicial examination, approval, and confirmation of the proceedings of the District Board of Directors and of the District leading up to and including the making of this contract and the validity of the provisions thereof, and this contract shall not be binding on the United States until said proceedings and contract shall have been so confirmed by a court of competent jurisdiction or pending appellate action in any court if ground for appeal be laid: Provided, That nothing herein contained shall require the District to assume the responsibility for prosecuting judicial review beyond the highest court of the State of California.

PERFORMANCE OF WORK WITH CONTRIBUTED FUNDS

29. (a) Pursuant to the Act of March 4, 1921 (41 Stat. 1367, 1404), the United States will perform with funds contributed by the District any construction or maintenance work on the distribution system not otherwise provided for by this contract, or any construction work covered by this contract but for which funds may not be available: Provided, That the undertaking of any such work and the plans therefor must be approved by the United States. When the undertaking of such work is approved, funds therefor shall be advanced by the District as may be directed by the Contracting Officer and there shall be submitted to the United States a certified copy of the resolution of the Board of Directors of the District describing the work to be done and authorizing its performance with contributed funds.

(b) After completion of any work so undertaken the District will be furnished with a statement of the cost thereof, and any unexpended balance of the funds will be refunded to the District or applied as otherwise directed by the District, and the amount by which the cost of such work exceeds the amount of the funds advanced by the District therefor shall be paid by the District to the United States as the Contracting Officer may direct.

EQUAL EMPLOYMENT OPPORTUNITY

30. (a) During the performance of this contract, the District, hereinafter in this article referred to as the contractor, agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall

include, but not be limited, to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the. provisions of this non-discrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, as amended, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(5) The contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, as amended, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination-clauses of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, as amended, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, as amended, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions; including sanctions for noncompliance: *Provided, however*, that in the event "the contractor becomes involved in, or is threatened with, litigation with a sub-contractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation-to protect the interests of the United States.

(b) Inclusion of the Equal Opportunity clause may be by reference to Section 301 of Executive Order 10925, dated March 6, 1961, as amended. Subcontracts below the second tier, other than subcontracts calling for construction work at the site of construction are exempt from inclusion of the clause.

IN WITNESS WHEREOF, the parties hereto have executed this contract the day and year first above written.

APPROVED AS TO LEGAL
FORM AND SUFFICIENCY

/s/ [Illegible]
Principal Solicitor
Department of the Interior

THE UNITED STATES OF AMERICA

By: [Illegible]
Regional Director, Region 2
Bureau of Reclamation

WESTLANDS WATER DISTRICT

By: [Illegible]
President

(SEAL)
Attest:

/s/ [Illegible]
Secretary

Approved:

[Illegible]
Secretary of the Interior

[Exhibits Omitted]

WESTLANDS WATER DISTRICT

RESOLUTION NO. 150-64

WHEREAS, on June 5, 1963 this District entered into a contract with the United States of America for a water supply for the lands of Westlands Water Distract from the San Luis Unit of the Central Valley Project; and

WHEREAS, In order to utilize said water supply It will be necessary for the District to have a system constructed for the distribution of water to and drainage of water from the lands within the District; and

WHEREAS, it is contemplated that the extent of the drainage facilities, and possibly some water distribution facilities, required for the lands within the District will increase over a period of years and, therefore, it. Is desirable that provision for their ultimate construction be made at this time; and

WHEREAS, this District did on the 20th day of November, 1963 approve a form of repayment contract under the terms of which the United States would construct a water distribution and drainage system to serve the lands of the District; and

WHEREAS, since said approval by the District, certain changes have been made in said form of contract by the United States Bureau of Reclamation and a revised draft of contract marked Draft 4/8-1964 embodying such changes has been submitted to this District for approval; and

WHEREAS, the lands within the District are in great need of water and It is of extreme urgency that the water distribution facilities and the portion of the drainage works presently required be completed to the fullest extent possible at the time water is available from the San Luis Canal late in the year 1967 or early in the year 1968.

NOW, THEREFORE, BE IT RESOLVED, that the draft of contract entitled "Contract Between the United States and

Westlands Water District Providing for the Construction of a Water Distribution and Drainage Collector System" and marked Draft 4/8-1964 be and it is hereby, approved subject to such minor editorial changes, if any, as swim required in the judgment of the Manager-Chief Counsel of the District; and

BE IT FURTHER RESOLVED, that upon approval of said draft of contract by the Secretary of the Interior, the Manager-thief Counsel of the District is authorized and directed to submit said form of contract to the California Districts Securities Commission for approval and to do any and all things required by law to be done to permit execution of said contract on behalf of this District; and

BE IT FURTHER RESOLVED, that upon completion of all steps required by law to be token prior to the execution thereof, the President and Secretary of this District be, and they are hereby, authorized to execute said contract for and on behalf of Westlands Water District.

AYES: GIFFEN, BAKER, BENSON, DIENER, van LOSEN SELS

NOES: NONE

ABSENT: ROBINSON

STATE OF CALIFORNIA)
) ss
COUNTY OF FRESNO)

STEWART P. SMITH, does hereby certify that he is the duly appointed, qualified and acting Secretary of WEST-LANDS WATER DISTRICT, a public district organized under the laws of the State of California with Its offices at Fresno, California; that the foregoing Resolution Humber 150-64 was duly and regularly adopted by the Board of Directors of WESTLANDS WATER DISTRICT at a meeting of said Board of Directors duly called and held on the 13th day of April, 1964 at the offices of said WESTLANDS WATER DISTRICT, at which a quorum of said Directors was present and acting; and that said Resolution Is still in full force and effect.

DATED: April 14, 1964

/s/ Stewart P. Smith
STEWART P. SMITH
Secretary, Westlands Water District

(SEAL)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RECORDED IN OFFICIAL RECORDS OF
FRESNO COUNTY, CALIFORNIA
At 10 min. past 4 p.m.
Aug 7, 1969
J.L. Brown, County Recorder Fee $10.00

Exhibit B
Page 1

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

AGREEMENT PERTAINING TO
SALE OF EXCESS LANDS

THIS AGREEMENT, made this 12 day of June, 1969, under the provisions of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all collectively herein styled the Federal reclamation laws, between THE UNITED STATES OF AMERICA, herein styled "the United States", represented by the Secretary of the Interior or his duly authorized representative, and Edwin R. O'Neill and Kristan L. O'Neill, husband and wife herein styled "the Landowner";

WITNESSETH THAT:

WHEREAS, pursuant to the Federal reclamation laws, the United States and the Westlands Water District have entered into a contract herein referred to as the District Contract, dated June 5, 1963, a copy of which is on file in the office of said District in the City of Fresno, County of Fresno, California, of which articles 23, 24, and 25 provide for the execution of certain contracts by owners of irrigable excess land within the District and the valuation and conditions of sale of such land, and of article 23 which, among other things,

provides in part as follows:

> No water made available pursuant to this contract shall be furnished to any excess lands as defined in article 25 hereof unless the owners thereof shall have executed valid recordable contracts in form prescribed by the United States, agreeing to the provisions of this article and Articles 24 and 25 of this contract, agreeing to the appraisal provided for in Article 24 hereof and that such appraisal shall be made on the basis of the actual bona fide value of such lands at the date of the appraisal without reference to the construction of the Project, all as hereinafter provided, and agreeing to the sale of such excess lands under terms and conditions satisfactory to the Secretary and at prices not to exceed those fixed as hereinafter provided.

WHEREAS, the Landowner is the owner of certain land situated in the County of Fresno, California, and within the territorial limits of and incorporated into and as a part of, the District; and

WHEREAS, the Landowner, pursuant to article 25 of the District Contract, has designated as nonexcess land a portion of the aforesaid land and has filed with the District a written description thereof;

NOW, THEREFORE, in consideration of the direct and indirect benefits to be derived under the terms of the District Contract; as implemented by this agreement, by all of the lands of the Landowner within the District, and as an inducement to the United States to make water and distribution facilities available to the District for the excess land of the Landowner, the Landowner agrees and covenants for himself, his executors, administrators, heirs, successors, and assigns, all of which agreements and covenants are and each of them hereby is made a charge upon the excess land of the Landowner to run with the title to the said excess land, as follows:

1. Each term defined in the District Contract shall, when used herein, have the same meaning as that which it has when used in the District Contracts

2. The Landowner is the owner of excess land situated in Fresno County, California, and particularly described as follows:

PARCEL ONE: That portion of the north half (N 1/2) of Section Seven (7), Township Eighteen (18) South, Range Seventeen (17) East, Mount Diablo Base and Meridian, lying southeast of the southeasterly right of way line of the Fresno Coalinga Road, as said road is described in the deed to the County of Fresno recorded September 22, 1924 in Book 492 at Page 41, as Document No. 25290, Fresno County Official Records; BUT EXCEPTING THEREFROM that portion thereof lying within Butte Avenue, a deeded road, said Butte Avenue being described in the right of way deed to the County of Fresno recorded November 8, 1948 in Book 2689 at Page 102, as Document No. 52265, Fresno County Official Records; containing an area of 93 acres, more or less, after said exception.

PARCEL TWO: The southwest quarter (SW 1/4) of Section Eight (8), Township Eighteen (18) South, Range Seventeen (17) East, Mount Diablo Base and Meridian, BUT EXCEPTING THEREFROM that portion of the west half of the southwest quarter of the southwest quarter (W 1/2 SW 1/4 SW 1/4) of said Section Eight (8) lying North of the south 35 feet thereof; ALSO EXCEPTING THEREFROM that portion thereof lying within Butte Avenue, a deeded road, said Butte Avenue being described in the right of way deed to the County of Fresno recorded November 8, 1948 in Book 2689 at Page 102 as Document No. 52265, Fresno County Official Records; containing an area of 140 acres, more or less, after said exception:.

PARCEL THREE: The southeast quarter (SE 1/4) of Section Eight (8), Township Eighteen (18) South, Range Seventeen (17) East, Mount Diablo Base and Meridian, containing an area of 160 acres, more or less.

PARCELS ONE, TWO and THREE containing a combined area of 393 acres, more or less.

Each of said parcels being subject to existing rights of way in favor of the public or third parties for highways, roads, railroads; telegraph, telephone and electrical transmission lines and canals, laterals, ditches, flumes, siphons and pipelines on, over and across said premises.

Excepting and reserving as to each of said parcels all oil, gas and minerals and other hydrocarbon substances in and under said land, together with the right of ingress and egress thereto, as necessary or desirable, for the exploration, development and exploitation of all such reserved rights; Provided; that upon exercise of any of said rights of ingress and egress for exploration, development and exploitation the owner of said mineral rights shall fully indemnify the surface owner for any and all damages or losses resulting therefrom or caused thereby. This indemnification provision shall be binding upon the landowner herein, his executors, administrators, heirs, and assigns, and any conveyance of mineral rights by the landowner herein shall specifically contain such a provision for indemnification.

3. The appraised value of said excess land within the meaning of the District Contract and this contract shall be determined in a manner to be prescribed by the Secretary of the Interior. At the option of the Landowner, however, the said value may be determined, subject to the approval thereof by the Secretary, by three appraisers, one designated by the United States, one designated by the District, and the third designated by the first two, or upon their failure to agree by

the presiding Justice of the Fifth District Court of Appeals of the State of California. Said excess land shall be appraised at its fair market value, but in the appraisal no value shall be given such land on account of the existing or prospective availability of water or service from the Central Valley Project. The value of the improvements on the land at the time of appraisal shall be included therein, but shall also be set forth separately in such appraisal.

4. The Landowner agrees that the land described in article 2 hereof shall be subject to the terms of this contract and the terms of articles 23, 24, and 25 of the District Contract and said articles are hereby made a part of this agreement by reference.

5. All rights of the Landowner to receive Project water for his excess land shall be subject to the provisions of the District Contract and this contract.

6. The Landowner agrees that if and when any or all of the land described in article 2 hereof is sold by or for him, it will be sold at prices not exceeding the appraised value thereof as fixed pursuant to the procedure set forth in article 3 or as said appraised value may be modified as hereinafter provided, plus the appraised value of the crops growing on said land at the date of sale. The value of crops growing on the land at the date of sale shall be included but shall be set forth separately in the appraisal.

7. If an appraisal has been made pursuant to article 3 prior to the sale of the land described in article 2 of this agreement, either the Landowner or the United States may require that said land or any part thereof be again appraised at any time prior to the sale thereof, and such appraisals shall be made as provided in article 3 hereof. The cost of the first two appraisals of each tract of excess land shall be paid by the United States. The cost of each appraisal thereafter shall be paid by the party requesting such appraisal. The value established by any new appraisal shall supersede the value

established by the existing appraisal on the date of the receipt of a registered letter to the Landowner notifying him of said new appraisal.

8. None of the excess land described in article 2 hereof shall be entitled to receive water nor shall service be made available to such land pursuant to the District Contract, except while owned by the Landowner, unless the same shall have been sold to a person who, as the owner of such land, is qualified as a nonexcess Landowner to receive Project water under the provisions of the Federal reclamation laws, the District Contract, and this agreement in full compliance with the provisions thereof.

9. When any of the excess land covered by this agreement shall have been transferred in accordance with the provisions hereof to a person who, as the owner of such land, qualifies as a nonexcess Landowner under the District Contract, the land so transferred shall thereupon be subject to and governed by the terms and provisions of said District Contract applicable to nonexcess lands.

10. The terms "sold" and "transferred", as used in articles 6, 8, and 9 of this agreement, include conveyance by way of bona fide gift, dividend, or otherwise, if the consideration, if any, received by the Landowner does not exceed the appraised value as determined pursuant to article 3 hereof or the reappraised value as determined pursuant to article 7 hereof.

11. The Landowner hereby irrevocably makes, constitutes, and appoints the Secretary of the Interior, United States Department of the Interior, his true and lawful attorney for him in his name, place, and stead, to sell and transfer at any time following the expiration of a period of ten years immediately following the date of execution of this agreement, all of his then right, title, and interest in and to any or all of the excess land described in article 2 hereof, owned by

the Landowner, beneficially or otherwise, by such instrument as may be agreed upon between the Secretary and any other parties: *Provided*, That such sale shall not be made at a price which is less than the appraised value as fixed pursuant to the procedure set forth in article 3 hereof, or such appraised value as amended pursuant to article 7 hereof: *Provided further*, That such sale of said excess land shall be only for cash or upon terms satisfactory to the Landowner. The Landowner gives and grants irrevocably unto his said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done to transfer title to said property, as fully to all intents and purposes as the Landowner might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that said attorney or his substitute shall lawfully do, or cause to be done, by virtue of these presents.

12. In the event that the Congress of the United States repeals the so-called excess-land provisions of the Federal reclamation laws, this agreement shall no longer be of any force or effect, and, in the event that the Congress amends the excess-land provisions or other provisions of the Federal reclamation laws, the United States agrees, at the option of the Landowner, to negotiate amendments of the appropriate articles of this agreement, all consistently with the provisions of such repeal or amendment.

13. In the event that the District Contract shall not become effective, or, through no breach on the part of the District, should terminate prior to the expiration of the term thereof, then this agreement shall also terminate: Provided, That any recordable contract relating to the excess land described in article 2 hereof shall similarly provide that the power of attorney conferred upon the Secretary for the disposal of said land shall become effective ten years from the date of the execution of this recordable contract: Provided further, That the computation of the ten-year period prescribed in article 11

hereof shall not include any year or years in which water or service from the Project may not be available to the land involved through no fault of the District or the Landowner.

Exhibit B
11

IN WITNESS WHEREOF, the parties have caused this agreement to be executed the day and year first above written.

THE UNITED STATES OF AMERICA
By /s/ _____
Regional Director, Region 2
Bureau of reclamation

LANDOWNER

/s/ Kristan L. O'Neill
Kristan L. O'Neill

LANDOWNER

/s/ Edwin R. O'Neill
Edwin R. O'Neill
Address: P.O. Box 787
Fresno, California 93712

ACKNOWLEDGMENT

STATE OF CALIFORNIA) ss.
COUNTY OF FRESNO)

On this 12 day of June, 1969, before me, Michael J. O'Neill, personally appeared Edwin R. O'Neill and Kristan L. O'Neill the person whose name is last subscribed to the within instrument and acknowledged that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this acknowledgment above written.

/s/ Michael J. O'Neill
Notary Public in and for the
County of Fresno, State of California
My commission expires _____

[Seal]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT
No. CV 79-106-EDP

BARCELLOS AND WOLFSEN, INC., et al.,
Plaintiffs,

v.

WESTLANDS WATER DISTRICT, et al.,
Defendants.

WESTLANDS WATER DISTRICT,
Counterclaimant and Cross-Claimant,

v.

BARCELLOS AND WOLFSEN, INC., et al.,
Counterclaim and Cross-Claim Dependants.

BARCELLOS AND WOLFSEN, INC., et al.,
Counterclaimants and Cross-Claimants,

v.

UNITED STATES OF AMERICA, et al.,
Counterclaim and Cross-Claim Defendants.

FRANK. ORFF, as representative of 1B Class,
Counterclaimant and Cross-Claimant,

v.

UNITED STATES OF AMERICA, et al.,
Counterclaim and Cross-Claim Defendant.

CONSOLIDATED
No. CV F-81-245-EDP

WESTLANDS WATER DISTRICT, et al.,
Plaintiffs-in-Consolidation.

v.

UNITED STATES OF AMERICA, et al.,
Defendants-in-Consolidation.

BARCELLOS & WOLFSEN, INC., et al.,
Plaintiffs,

v.

WESTLANDS WATER DISTRICT, et al.,
Defendants.

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Pursuant to the Stipulation for Compromise Settlement, effective as of Aug. 29, 1986, the Order, dated Oct. 1, 1986, and the Order, dated Dec. 30, 1986.

IT IS ADJUDGED, ORDERED, DECLARED AND DECREED as follows:

1. Definitions.

As used herein, the following words and phrases shall have the following meanings:

1.1. "1A Parties": Plaintiffs, the class representatives (in their individual and representative capacities) of the Area 1A Class, all landowners and water users in the Area IA Class and their predecessors and successors, and each other party to the extent such party owns, or uses water on, land in Area 1A;

1.2. "lB Parties": The class representative (in his individual and representative capacities) of the Area 1B Class, all landowners and water users in the Area 1B Class and their predecessors and successors, and each other party to the extent such party owns, or uses water on, land in Area 1B;

1.3. "2A Parties": The class representatives (in their individual and representative capacities) of the Area-2A Class, all landowners and water users in the Area 2A Class and their predecessors and successors, and each other party to the extent such party owns, or uses water on, land in Area 2A;

1.4. "2B Parties": The class representatives (in their individual and representative capacities) of the Area 2B Class, all landowners and water users in the Area 2B Class and their predecessors and successors, and each other party to the extent such party owns, or uses water on, land in Area 2B;

1.5. "1939 Act": The Reclamation Project Act of August 4, 1939, 53 Stat. 1187;

1.6. "1960 Act": The Act of June 3, 1960, 74 Stat. 156, authorizing the San Luis Unit of the Central Valley Project, as supplemented by the Act of June 15, 1977, 91 Stat. 225;

1.7. "1963 Contract": Contract number 14-06-200-495, dated June 5, 1963, entered into between the United States and the Original Westlands District, as supplemented by a memorandum dated February 15, 1915, both of which are attached hereto as Exhibit A;

1.8 "1965 Contract": number 14-06-200-2020A, dated April 1, 1965, entered into between the United States and the Original Westlands District, attached hereto as Exhibit B;

1.9. "1982 Act": The Reclamation Reform Act of October 12, 1982, 96 Stat. 1261;

1.10. "Area IA": The area of the Original Westlands District within the proposed initial service area of the San Luis Unit of the Central Valley Project, as depicted on Plate 1 in the report of the U.S. Bureau of Reclamation entitled "A Report on the Feasibility of Water Supply Development, San Luis Unit, Central Valley Project, California," dated May 1955, and transmitted to the Congress on December 17, 1956;

1.11. "Area 1B": The area of the Original Westlands District outside said proposed initial service area;

1.12. "Area 2A": The area of the Former Westplains District within Said proposed initial service area;

1.13. "Area 2B": The area of the Former Westplains District outside said proposed initial service area;

1.14. "Area I": All the lands in the Original Westlands District;

1.15. "Area II": All the lands in the Former Westplains District;

1.16. "Bookkeeping Account Period": The period of time covering June 30 through December 31, 1978, all of the years 1975, 1982, 1983, 1984, 1985, 1986 and the year 1987 through the end of the month in which this Judgment is entered;

1.17. "Cost Effective": In connection with Drainage Service Facilities, has reasonable costs in relation to the quantity of subsurface agricultural drainage water transported, treated or disposed of thereby; and, in connection with Drainage Reduction Programs, has reasonable costs in relation to the quantity of subsurface agricultural drainage water reduced thereby;

1.18. "Costs of Construction": Costs of design, preparation of plans and specifications, acquisition of real and personal property, and actual construction, excluding administrative, indirect and overhead costs;

1.19. "Discretionary Provisions of 1982 Act": Sections 203-208 of the 1982 Act;

1.20. "District": The Westlands Water District;

1.21. "Drain": The work which is referred to as the "San Luis interceptor drain" in Section 1 of the 1960 Act and defined as the "interceptor drain" in Article 1(d) of the 1963 Contract and which between March 13, 1968; and February 4, 1975, was partially constructed between Laguna Avenue in Fresno County and Kesterson Reservoir in Merced County;

1.22. "Drainage Plan": The plan described in Paragraph 6.1 of this Judgment;

1.23. "Drainage Reduction Program": Any facility or activity which reduces the amount of subsurface drainage water requiring drainage service in the District.

1.24. "Drainage Service Facility": The Drain or any significant drainage service facility constructed or acquired by either the united States or the District as partial or full alternatives to the Drain providing drainage service for lands in the District;

1.25. "Drainage Trust Fund": The trust fund established by Paragraph 7.1 of this Judgment;

1.26. "Existing Trust Fund": The trust fund established by the Stipulated Agreement, as amended, between the Federal Parties and the District, attached hereto as Exhibits C, D, E, F and G;

1.27. "Federal Parties": The United States Department cf the Interior; the Bureau of Reclamation of the Department of the Interior; the Secretary of the Interior; the Assistant Secretary of the Interior for Water and Science; the Commissioner of Reclamation; and the Regional Director of the Bureau of Reclamation for the Mid-Pacific Region;

1.28. "Former Westplains District: The Westplains Water Storage District, as it existed immediately prior to June 29, 1965;

2.29. "Interim Contract": (a) Any temporary short-term water service contract between the District and the United States with respect to the period between June 30, 1980, and December 31, 1981, and (b) the Stipulated Agreement between the United States and the District, approved September 16, 1981, in Westlands Water District v. United States et al., U.S. Dist. Ct., E.D. Calif. No. CV-F-81-245-EDP, attached hereto as Exhibit C, and the amendments thereto approved on September 10,

1982, March 14, 19E5, November 5, 1985, and February 11, 1986, attached hereto as Exhibits D, E, F and C;

1.30. "Internal Allocation Rule": Any water allocation regulation or policy adopted by the District;

1.31. "Internal Pricing Rule": Any water pricing regulation or policy adopted by the District;

1.32. "Merger Law": The Westlands Water District Merger Law, California Water Code sections 37800 through 37856;

1.33. "MCI Uses": Uses other than agricultural use;

1.34. "Original Westlands District": The Westlands Water District, as it existed immediately prior to June 29, 1965;

1.35. "Overpayment Refund Account": The special account established by Paragraph 8.4 of this Judgment;

1.36. "Statutory Interest": Simple interest at the rate or rates established pursuant to Section 12 of the Contract Disputes Act of 1978 (92 Stat. 2389, 41 U.S.C. §611).

2. Termination of Stipulated Agreement and Duration of Judgment.

The Stipulated Agreement identified in Paragraph 1.29(b) above shall terminate at the end of the month in which this Judgment is entered. This Judgment shall govern the rights and duties of all parties for its term commencing the first day of the month following entry of this Judgment and terminating December 31, 2007, except as otherwise provided in Paragraph 13.3(c) below and Exhibit K of this Judgment.

3. Enforcement of Judgment.

A party may obtain relief from a violation of this Judgment only by (a) the filing of a new action, or (b) the filing of a motion in these present actions. Either of these proceedings

against the Federal parties shall, except as otherwise specifically limited by Paragraphs 6.1, 12.1.1, 12.1.2 and 12.3 of this Judgment, be for the sole purpose of seeking an order directing the Federal parties to perform in accordance with the express terms of this Judgment; provided, that any other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of (a) Paragraph 5 below or (b) any contract or other right or obligation arising independently of this Judgment, notwithstanding that (i) it is required to be performed by this Judgment, (ii) its future creation is anticipated or encouraged by this Judgment, or (iii) it is otherwise a subject of this Judgment. A motion in these present actions to obtain relief from an alleged violation of this Judgment may be filed only after 60 days prior written notice to all other parties that such a motion will be filed if another party or other parties fail or refuse to perform in the manner described in said notice. The parties entitled to file such a motion and to receive such prior written notice thereof in these present actions shall be limited to the Area representatives provided for in Paragraph 22 below (who shall represent the interests of the class members within the areas they represent), the United States, the District, and any landowners or water users who have heretofore appeared in these present actions on their own behalf. The parties shall not seek judicial enforcement of this Judgment in any other manner than described above. During the term of this Judgment, each party shall perform all acts it is obligated hereunder to perform. This Judgment shall not alter or impair, or deprive any party of, any existing legal rights or confer on any party any right except as expressly provided herein.

4. 1963 Contract.

4.1. Beginning the first day of the month after this Judgment is entered, the District and the United States shall perform the 1963 Contract; provided, that the District waives the right to make payment for water requested and delivered

under Articles 4(c) or 8 of said contract at the rate provided in Article 6 thereof so long as the rate charged for said water does not exceed the applicable Central Valley Project water rate as of the date of delivery; provided further, that to facilitate and implement the existing water conservation policies of the United States, (a) Article 1(f) of said contract shall be revised to state: "'year' shall mean the period commencing March 1 of each year through the last day of February of the following year"; (b) Article 6(b) of said contract shall be revised by substituting "March 1" for "January 1" and "September 1" for "July 1"; and (c) notwithstanding the provisions of Article 3(d) of said contract, the quantity of water the United States shall be obligated to furnish, and the District to pay for, pursuant to Article 3 of said contract during the period commencing March 1, 2007, and ending December 21, 2007, shall be 611,000 acre-feet. The 1963 Contract is a valid, enforceable and implementable contract entitling the District through the end of 2007 to water and other service by the United States as specified therein.

4.2. The District acknowledges that it entered into the 1963 Contract for the benefit of Areas IA and 1B and the lands therein. The District will enforce the prior rights of said areas to the benefits of said contract and acknowledges that water users in Areas 2A and 2B may purchase water under the 1963 Contract not purchased by water users in Areas IA and 1B as provided in this Judgment. To the extent that water under the 1963 Contract is purchased by a water user in Area 2A or Area 2B, the District shall collect from such water user and pay the United States for such water the water service rate set forth in Article 6(a) of the 1963 Contract, Paragraph 4.4 below or 4.5.4 below, whichever is applicable, plus a $0.50 per acre foot drainage service charge, until such water user becomes entitled to water service pursuant to the long-term contract described in Paragraph 12.1.1 below, whereupon the contracting improvement district of the District shall collect from such water user and pay the United States for

such water the applicable rates set forth in such long-term contract.

4.3. The District shall not enter into any contract which would modify the rights and obligations under the 1963 Contract prior to 2008, except with the concurrence of Area I as provided in Paragraph 22.5 below; provided, that such concurrence nay be obtained only by lack of objection by Area I representatives and not by an advisory election under said paragraph.

4.4. The agricultural water service component of the rates to be paid to the United States for water delivered under Article 3 of the 1963 Contract to lands which become subject to the Discretionary Provisions of the 1982 Act shall be the higher of (a) $7.50 per acre foot or (b) the appropriate rate as of the date of delivery established pursuant to the 1982 Act.

4.5. Water deliveries under the 1963 Contract for M&I Uses shall be in accordance with Paragraph 4.5.1 through 4.5.4 below.

4.5.1. Such water shall be quantified and identified in the schedule or any revision thereof submitted by the District in accordance with Article 4(a) of the 1963 Contract;

4.5.2. Such water shall be measured at canalside delivery points established pursuant to Article 9 of the 1963 Contract which are used exclusively to deliver water for M&I Uses, as determined by the United States, with equipment installed, operated and maintained by the United States. The District shall measure all water furnished by the District for M&I Uses at other delivery points with equipment installed, operated and maintained by the District. Said equipment and its installation, service and use shall be approved by the United States. The United States shall have full access at all reasonable times to inspect said measuring equipment to determine the accuracy and conditions thereof and any errors in measurements disclosed by said inspections shall be ad-

justed. If said facilities are found to be defective or inadequate they shall be adjusted, repaired or replaced by the District. In the event the District neglects or fails to make such repairs or replacements within a reasonable time as may be necessary to satisfy the operating requirements of the United States, the United States may cause repairs or replacements to be made and the costs thereof charged to the District, which charge shall be paid to the United States before April 1 of the year following that in which the cost was incurred and a statement thereof furnished by the United States;

4.5.3. The Federal Parties shall submit a report to the District as to the quantity of water the United States measures and the District shall submit a report to the Federal Parties as to the quantity of water the District measures. Said reports shall be submitted on or before the 10th day of each month following the month in which the water is measured;

4.5.4. Such water shall be paid for in accordance with Article 6(b) of the 1963 Contract at the applicable Central Valley Project water rate as of the date of delivery.

5. Provisional Water Service.

5.1. The provisions of Paragraphs 5.2 through 5.3 below are included in this Judgment in light of the facts recited in this Paragraph 5.1, as agreed to by the parties. Each year from 1964 through 1981, the Federal Parties have permitted the District to take various quantities of water from the Mendota Pool pursuant to annual contracts to supplement the water provided to the District under the 1963 Contract. Since 1965 when the Former Westplains District was merged into the Original Westlands District, the Federal Parties have recognized that a firm water supply from the San Luis Unit of 200,000 acre feet per year in addition to the water from the San Luis Unit provided for in the 1963 Contract and a firm water supply of 50,000 acre feet per year from the Mendota

Pool, are necessary within the boundaries of the District as it was expanded by the merger. Such additional water supplies have consistently been allocated and provided to the District by the Federal Parties each year from 1972 through 1961, inclusive, pursuant to a series of annual contracts. Thereafter, such additional water supplies have been provided pursuant to the Stipulated Agreement, as amended, Exhibits C, D, E, F and G attached hereto. The District has claimed that, pursuant to the provisions of the memorandum from Kenneth Holum, Assistant Secretary of the Interior, Water and Power Development, to Stuart Udall, Secretary of the Interior, dated October 4, 1965, approved by Secretary Udall on October 7, 1964, and related activities, it is entitled as of right to both of these additional supplies of water, a claim which the United States disputes herein. The parties have agreed to settle this claim by recognizing the claim for the purposes of this settlement only to the limited extent set forth in Paragraphs 5.2 through 5.3 below and subject to the provisions of Paragraph 14.1.1 below.

5.2. In addition to the quantity of water specified in Article 3 of the 1963 Contract, the District shall be entitled to provisional water service from the United States of 200,000 acre feet per year from the San Luis Unit and 50,000 acre feet per year from the Mendota Pool under the conditions specified in Paragraphs 5.2.1 through 5.2.4.7 below.

5.2.1. The District shall pay the United States for water delivered to lands which are not subject to the discretionary provisions of the 1982 Act the Central Valley Project water rates applicable to the District as of the date of delivery.

5.2.2. The District shall pay the United States for water delivered to lands which are subject to the Discretionary Provisions of the 1982 Act the higher of (a) the rates payable under Paragraph 5.2.1 above or (b) the appropriate rate established pursuant to the 1982 Act.

5.2.3. The District shall pay the United States for water delivered for M&I Uses at the applicable Central Valley Project water rates as of the date of delivery.

5.2.4. Provisional water service under this Paragraph 5 shall commence the first day of the month after this Judgment is entered and end February 28 next following the conclusion of the action entitled *Contra Costa Water District v. Donald Hodel, as Secretary of the Interior*, U.S. Dist. Ct., N.D. Calif., Civil No. C-75-2508-SW, unless said action is concluded by a final dismissal with prejudice, in which event said provisional water service shall end two years after such dismissal. All other terms and conditions of such provisional water service shall be the same as under the "Contract between the United States and Westlands Water District for Temporary Water Service from San Luis Unit and Mendota Pool," R.O. Draft 4/10-1981, (hereinafter "Draft Contract") attached to the Stipulated Agreement identified in Paragraph 1.29(b) above (Exhibit C hereto), except as modified in Paragraphs 5 and 7 of the Stipulated Agreement and further modified in Paragraphs 5.2.4.1 through 5.2.4.7 below.

5.2.4.1. No change in the rates to be paid for water delivered for agricultural use or M&I Uses shall be effective for any year unless written notice of the estimated rate is given to the District on or before the preceding September 1 and written notice of the actual rate is given to the District on or before the preceding December 1.

5.2.4.2. The following is substituted for Article 6(c) of the Draft Contract:

> "By February 1 of each year, the District shall make any additional payment it is obligated to make for the year."

5.2.4.3. The following is substituted for Article 15 of the Draft Contract:

> "(a) The parties agree that the delivery of irrigation water or the use of Federal facilities pursuant to this

contract is subject to the acreage and ownership limitations and pricing provisions of reclamation law, as amended and supplemented, including but not limited to the 1982 Act.

"(b) The Contracting Officer shall have the right to make, after an opportunity has been offered to the Contractor for consultation, rules and regulations consistent with the provisions of this contract, the laws of the United States and the State of California, to add to or to modify them as may be deemed proper and necessary to carry out this contract, and to supply necessary details of its administrations which are not covered by express provisions of this contract. The Contractor shall observe such rules and regulations."

5.2.4.4. The following is substituted for Article 19 of the Draft Contract:

"Where the terms of this contract provide for action to be based upon the opinion or determination of either party to this contract, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations. In the event that the Contractor questions any factual determination made by the Contracting Officer, the findings as to the facts shall be made by the Secretary only after consultation with the Contractor and shall be conclusive upon the parties."

5.2.4.5. The following is substituted for Article 20 of the Draft Contract:

"The Contractor shall pay a late payment charge on installments or charges which are received after the due date. The late payment charge percentage rate calculated by the Department of the Treasury and published quarterly in the Federal Register shall be used; provided, that

the late payment charge percentage rate shall not be less than 0.5 percent per month. The late payment charge percentage rate applied on an overdue payment shall remain in effect until payment is received. The late payment rate for a 30-day period shall be determined on the day immediately following the due date and shall be applied to the overdue payment for any portion of the 30-day period of delinquency. In the case of partial late payments, the amount received shall first be applied to the late charge on the overdue payment and then to the overdue payment."

5.2.4.6. Article 31 of the Draft Contract is deleted.

5.2.4.7. To facilitate and implement the existing policies of the United States, Article 1(d) of the Draft Contract shall be revised to state: "'Year' shall mean the period commencing March 1 of each year through the last day of February of the following year."

5.3. The District acknowledges that all water to which the District is entitled pursuant to Paragraph 5.2 above shall be for the benefit of the 2A Parties and the 2B Parties and the lands in Area 2A and Area 2B.

6. Drainage Service Facilities.

6.1. The Federal Parties, in consultation and cooperation with the District, shall develop, adopt and submit to the District by December 31, 1991, a Drainage Plan for Drainage Service Facilities, which shall have at least the elements set forth in Paragraphs 6.1.1 and 6.1.2 below; provided, that the remedies available to a party for an alleged breach of this paragraph by the Federal Parties shall be strictly limited to (a) the release to the District of the money then deposited in the Drainage Trust Fund, plus accumulated interest, pursuant to Paragraphs 7.1.8 and 7.1.8.1, below, and (b) the revival of

any claim against the United States of the right to drainage service or Drainage Service Facilities pursuant to and in accordance with the terms of Paragraph 14.1.2, below.

6.1.1. The Drainage Service Facilities included in the Drainage Plan shall (a) in the aggregate have sufficient capacity and capability to transport, treat as necessary, and dispose of, the annual quantity of subsurface agricultural drainage water from the District (not less than 60,000 acre feet and not more than 100,000 acre feet) required to be disposed of by December 31, 2007, as projected in the Drainage Plan, (b) be Cost Effective and financially feasible, and (c) be capable of construction, acquisition and operation in compliance with all applicable law.

6.1.2. The Drainage Plan shall contain a schedule for the initiation and completion of each Drainage Service Facility by the United States. Adherence to the schedule will be contingent upon approvals within the Executive Branch and authorizations and appropriations by the Congress.

6.2. If the United States determines to construct or acquire Drainage Service Facilities prior to development of the Drainage Plan, the Federal Parties shall develop a plan for such facilities. Such plan shall be developed in consultation and cooperation with the District and shall have the same elements as the Drainage Plan except for the required acre-foot capacity of the facilities.

6.3. Drainage Service Facilities heretofore constructed by the United States are and, unless hereafter otherwise provided by statute, will be a work or works "connected with water supply and allocated to irrigation" and not any "irrigation water distribution work" as those terms are used in Section 9(e) of the 1939 Act. Section 9(d) of the 1939 Act does not prohibit the Federal Parties from presently providing water service or drainage service under the 1963 Contract. Agreement by the District to repay the Costs of Construction

by the United States of Drainage Service Facilities under said Section 9(d) is not a condition precedent to the United States' or the Federal Parties' duty to perform any term of the 1963 Contract. A per acre foot drainage service charge is a legal and valid method of repayment of the Costs of Construction by the United States of Drainage Service Facilities.

6.4. Because they are the drainage counterpart of the main conveyance facilities of the San Luis Unit, Drainage Service Facilities authorized by the 1960 Act are not a part of "distribution systems and drains" as that term is used in Section 8 of the 1960 Act.

7. Drainage Trust Fund.

7.1. To aid in funding costs of Drainage Service Facilities and to encourage and expedite United States' construction or acquisition thereof, beginning the first day of the month after this Judgment is entered, the District shall establish, maintain and use the Drainage Trust Fund exclusively for the purposes and in accordance with the terms and conditions specifled in Paragraphs 7.1.1 through 7.1.9 below.

7.1.1. Beginning the second year after this Judgment is entered, the District shall levy $5 million per year by assessments on all lands within the District, and deposit the money collected into the Drainage Trust Fund. Said $5 million per year may be increased by the District with Area I and Area II, concurrence as provided in Paragraph 22.5 below. To the extent necessary to meet the payment obligations from the Drainage Trust Fund under Paragraphs 7.1.4 and 7.1.7 below, the District shall borrow and deposit additional money therein. The District may terminate the collection and deposit of said $5 million per year when the District Board of Directors finds and determines, based on reasonable projections of said payment obligations and of interest earned on the money in the Drainage Trust Fund, that there is sufficient money therein to meet said payment obligations.

7.1.2. Each year, the per acre average of said assessments levied by the District within (a) the territory encompassing Areas IA and 1B and lands adjacent thereto annexed to the District after June 29, 1965, shall be 1.7 times the per acre average of said assessments within (b) the territory encompassing Areas 2A and 2B and lands adjacent thereto annexed to the District after June 29, 1965. However, within each of the territories described in (a) and (b) in the preceding sentence, the District shall apportion said assessments as authorized by law, including but not limited to Water Code Sections 36577 and 36578.

7.1.3. The District Treasurer shall be trustee of the Drainage Trust Fund and shall make the payments required under Paragraphs 7.1.4 and 7.1.7 below. The trustee shall invest the money in the Drainage Trust Fund to earn the highest possible rate of interest in prudent, legally authorized investments pursuant to California Government Code Sections 53600-53663. The interest earned on said investment shall become part of the Drainage Trust Fund.

7.1.4. For each Federal fiscal year (hereinafter "fiscal year") the trustee shall pay the United States from the Drainage Trust Fund, in accordance with the procedure and to the extent stated in Paragraph 7.1.5 below, a progress payment of 35 percent of the estimated Costs of Construction by the United States during that fiscal year of Drainage Service Facilities. As to facilities constructed or acquired by the United States for drainage service which have capability to serve others in addition to capability as Drainage Service Facilities, the 35 percent progress payment to be paid from the Drainage Trust Fund shall be reduced to reflect the District's proportionate benefits from such facilities. The required progress payment to the United States from the Drainage Trust Fund for any fiscal year shall not exceed $500,000 per facility for design and preparation of plans and specifications and $15 million for total Costs of Construction

of all facilities. The progress payments in the aggregate shall not exceed $100 million. Accumulated payments from the Drainage Trust Fund under Paragraph 7.1.7 below shall be credited toward meeting both the District's fiscal year and aggregate progress payment obligations.

7.1.5. By July 1 of each year, the Federal Parties shall advise the trustee of the estimated Costs of Construction to be incurred by the United States during each quarter of the upcoming fiscal year. The trustee shall pay the United States the required portion of said estimated quarterly cost on October 1, January 1, April 1, and July 1 of that fiscal year, to the extent that the Congress has appropriated federal funds sufficient to cover the remainder of such estimated costs. In the event the trustee does not make such payment when due, the Federal Parties shall have the right to withdraw the required amount of money from the Drainage Trust Fund on behalf of the United States. At the end of each quarter, if the actual Costs of Construction incurred by the United States during such quarter were less than the estimated costs, there shall be an appropriate credit against the next quarterly progress payment obligation from the Drainage Trust Fund.

7.1.6. On October 1 and April 1 of each year, or at other times as agreed in writing by the Federal Parties and the trustee of the Drainage Trust Fund, the trustee shall provide a statement to the Federal Parties specifying the amount of money in the Drainage Trust Fund.

7.1.7. Upon the District's request, the Trustee shall pay the District from the Drainage Trust Fund:

(a)(i) the Costs of Construction, both before and after the date of this Judgment, of Cost Effective and financially feasible Drainage Service Facilities constructed or acquired by the District and the cost of Cost Effective and financially feasible Drainage Reduction Programs implemented by the District either before or after the

effective date of this Judgment, or (ii) the amounts needed to repay District funds, or the principal of money borrowed by the District, used either before or after the effective date of this Judgment to pay any of the foregoing costs;

(b) a maximum of $5 million which may be used for any one or more of the following: (i) to pay the costs of studies and investigations of drainage problems and solutions, either before or after the effective date of this Judgment; (ii) to repay District funds or the principal of money borrowed by the District to pay the costs described in (i) immediately above; (iii) to pay the interest cost of money borrowed by the District, either before or after the effective date of this Judgment, to pay the Costs of Construction (not exceeding a total of $30 million) of Drainage Service Facilities constituting "Alternative Means" under the agreement between the District and the U.S. Department of the Interior dated April 3, 1985 (a copy of which is attached hereto as Exhibit H); and

(c) the amounts needed to repay the principal of money borrowed and deposited into the Drainage Trust Fund by the District a required by Paragraph 7.1.1 above.

The District shall consult with the Federal Parties before incurring any Costs of Construction of Drainage Service Facilities or any costs of implementing Drainage Reduction Programs, or borrowing any money to pay such costs. Construction or acquisition by the District of Drainage Service Facilities or implementation by the District of Drainage Reduction Programs paid for with money from the Drainage Trust Fund shall reduce, by the amount of the design capacity of such facilities or by the design amount of drainage reduction resulting from such programs, the legal obligation

of the United States to the District, if any, to construct or acquire Drainage Service Facilities or provide drainage service.

7.1.8. The money then deposited in the Drainage Trust Fund, including accumulated interest, shall be released to the District free of any obligation to the United States if and when any of the conditions specified in Paragraphs 7.1.8.1 through 7.1.8.8 below occurs.

7.1.8.1. The Federal parties do not develop, adopt, and submit to the District the Drainage Plan by December 31, 1991.

7.1.8.2. The Congress has not authorized the appropriation of funds for the construction or acquisition of at least one Drainage Service Facility described in the Drainage Plan by December 31, 1993.

7.1.8.3. The Federal Parties have not commenced actual construction or acquisition of at least one Drainage Service Facility described in the Drainage Plan by December 31, 1996.

7.1.8.4. After the authorization referred to in Paragraph 7.1.8.2, the Congress for any two consecutive fiscal years does not appropriate funds for construction or acquisition 1 of Drainage Service Facilities.

7.1.8.5. After the Congress has appropriated funds for the construction or acquisition of Drainage Service Facilities, the Federal Parties do not diligently pursue construction or acquisition thereof.

7.1.8.6. The Federal Parties do not complete construction or acquisition of at least one Drainage Service Facility by the date provided in the Drainage Plan schedule.

7.1.8.7. The Federal Parties state that they will not develop or implement the Drainage Plan.

7.1.8.8. The Congress conditions future appropriations for Drainage Service Facilities on cost sharing arrangements different from those provided in Paragraph 7.1.4 above, and the District, after 30 days written notice to its landowners and water users and opportunity for hearing, gives written notice to the Federal Parties that it desires release of the money as provided in Paragraph 7.1.8. Such notice to the Federal Parties shall be given within six months of the effective date of, and shall specify, the Act of Congress giving rise to the District's right to a release of such money.

7.1.9. Each of the conditions specified in Paragraphs 7.1.6.1 through 7.1.8.7 above may be waived or the time extended by written agreement between the Federal Parties and the District, with Area I and Area II concurrence as provided , in Paragraph 22.5 below.

7.2. Upon release from the Drainage Trust Fund under Paragraph 7.1.8 above, the money not needed to discharge payment obligations previously incurred pursuant to Paragraph 7.1.7 above shall be paid by the District as a refund to the landowners whose 1 assessment payments were the original source of the money in amounts proportionate to such assessments.

7.3. Except as provided in Paragraph 7.3.2 below, on request of the District, the United States shall reimburse the District for the progress payments which were previously made by the District to the United States from the Drainage Trust Fund pursuant to Paragraph 7.1.4 above, plus Statutory Interest from the date each progress payment was made to the date on which the money in the Drainage Trust Fund is released to the District, with respect to any uncompleted Drainage Service Facility for which progress payments have been made if (i) for two consecutive fiscal years the United States has not incurred any Costs of Construction with respect to such facility and (ii) at the time of such request, the United States has not resumed and does not thereafter diligently

continue to incur Costs of Construction of such facility. Such reimbursement shall be accomplished by credits against water service payments due from the District to the United States, commencing the first day of the month after the Drainage Trust Fund is released to the District, until the total progress payments made pursuant to Paragraph 7.1.4 above have been reimbursed, with Statutory Interest on the unreimbursed amount starting the first day of said month. Thereafter, the District shall be entitled to no further credit for said progress payments made pursuant to Paragraph 7.1.4 above. 7.3.1. Notwithstanding the credits provided for in Paragraph 7.3 above, (a) water users in the District shall pay 1411 the District for water service the same amounts of money as they would have been required to pay for water service in the absence of said credits, and (b) at the time payments for such water service would have otherwise been made to the United States, the District shall deposit an amount of money equal to said credits into a special Assessment Refund Account of the District, which the District shall invest to earn the highest possible rate of interest in prudent, legally authorized investments pursuant to California Government Code Sections 53600-53683. Said interest shall become a part of said Assessment Refund Account. The money deposited into the Assessment Refund Account plus the interest I thereon shall be paid by the District periodically as soon as practicable as refunds to the landowners for the portion of their assessments not previously refunded from the released Drainage Trust Fund.

7.3.2. No reimbursement shall be made to the District pursuant to Paragraph 7.3 above of any progress payment previously made from the Drainage Trust Fund for any Drainage Service Facility if it is financially feasible for the District to complete construction and to operate and maintain such facility. In such event, the District shall have the right, but not the obligation, to complete the construction of, and to operate and maintain, such facility.

7.4. Unless and until one of the conditions specified in Paragraphs 7.1.8.1 through 7.1.8.8 above occurs, the parties shall not seek judicial relief based on any claim that the United States or the Federal Parties have any statutory, contractual or other obligation, or are violating any such obligation, to construct Drainage Service Facilities or to provide drainage service.

7.5. Beginning upon completion of construction or acquisition by the United States of any Drainage Service Facilities included in the Drainage Plan and continuing through December 31, 2007, the District shall pay the United States for drainage service, in addition to the $0.50 per acre foot drainage service charge under the 1963 Contract, a drainage service charge per acre loot of Central Valley Project water delivered to the District sufficient, when combined with the $0.50 per acre foot charge, to cover the District's share of the operation and maintenance costs of such Drainage Service Facilities. Such additional charge shall be adjusted by the Federal Parties annually in subsequent years after payment begins by the same percentage as the change in the annual operation and maintenance costs of said Drainage Service Facilities; provided, that no increase in such charge shall be effective for any year unless written notice of the estimated increase is given by the Federal Parties to the District on or before September 1 of the previous year and written notice of the actual increase is given by the Federal Parties to the District on or before December 1 of the previous year. The United States shall credit the total drainage service charges collected, first, to payment of the District's share of the operation and maintenance cost of said Drainage Service Facilities and, second, to the District's share of the construction costs of said facilities.

7.6. During the duration of this Judgment, the District shall not pay a total of more than $100 million (exclusive of any interest other than the $5 million referred to in Paragraph

7.1.7(b) above) for Costs of Construction of Drainage Service Facilities and costs of implementing Drainage Reduction Programs by either or both the District and the United States. If, however, the United States and the District agree to an amount greater than $100 million and the Area I and Area II concurrences are obtained as provided in Paragraph 22.5, the District shall pay such additional amount.

7.7. Nothing in Paragraph 6 above or this Paragraph 7 shall be deemed to prevent the Congress from conditioning future appropriations for Drainage Service Facilities on cost sharing arrangements different from those provided in this Judgment.

8. Refunds to District for Net Overpayments and Deposits.

The parties agree that, as a result of overpayments and underpayments by the District to the United States for water service since June 30, 1978, and deposits by the District to the Existing Trust Fund since January 1, 1982, the District is entitled to the money referred to in Paragraphs 8.1 and 8.2 below.

8.1. The entire amount in the Existing Trust Fund at the end of the month in which this Judgment is entered, including principal and interest, (which was a total of $37,960,287.75 as of February 28, 1986) shall be released to the District from said trust at the end of said month. As soon thereafter as possible, the money shall be used, first, for payment of court costs and attorneys' fees and expenses as provided in Paragraph 19 below and, second, to refund water users in the District having net credits as provided in Paragraph 9 below.

8.2. As of the end of the month in which this Judgment is entered, the District shall be entitled to a refund from the United States of a sum which was $6,900,081.00 as of February 28, 1986, as shown in Exhibit I attached hereto, which amount includes Statutory Interest. Said refund amount shall be adjusted to reflect overpayments and underpayments and Statutory Interest thereon from March 1, 1986, to the end of the month in which this Judgment is entered.

8.3. The adjusted refund referred to in Paragraph 8.2 above shall be applied as a credit against payments due from the District to the United States as provided in Paragraph 13.2 below.

8.4. Notwithstanding the credit provided for in Paragraph 8.3 above, (a) in the first year after this Judgment is entered, the District shall levy, and apportion within the District as authorized by law, and the landowners in the District shall pay to the District assessments in the total amount of said credit and (b) the District shall deposit the assessments so paid into a special Overpayment Refund Account of the District, which the District shall invest to earn the highest possible rate of interest in prudent, legally authorized investments pursuant to California Government Code Sections 53600-53683. Said interest shall become a part of the Overpayment Refund Account. The money in the Overpayment Refund Account shall be refunded or used as provided in Paragraphs 9.6.2 and 9.6.3 below.

9. Overpayment Credits and Underpayment Debits to Water Users.

9.1. The District shall establish a bookkeeping account for every District water user who purchased water from the District for use during the Bookkeeping Account Period.

9.2. Each water user's bookkeeping account shall show, as a credit, the amount of overpayments to the District and, as a debit, the amount of underpayments to the District for the various categories of water purchased by such water user for use during the Bookkeeping Account Period and the amount of Statutory Interest properly attributable thereto as determined by the District. Exhibit J attached hereto shows the totals of all overpayments and underpayments to the District for the Bookkeeping Account Period for the various categories of water as of February 28, 1986. Said totals shall be adjusted to reflect overpayments and underpayments from

March 1, 1986, through the end of the month in which this Judgment is entered. In allocating these adjusted totals and Statutory Interest thereon among the various water user's bookkeeping accounts, the District shall be guided by the principles set forth in Paragraphs 9.2.1 through 9.2.5 below.

9.2.1. All the water purchased by agricultural water users in Areas IA and 1B has been "San Luis agricultural" ("SL AG") water. The remaining SL AG category water not purchased by agricultural water users in Areas lA and 1B for use in each year has been purchased by agricultural water users in Areas 2A and 2B in proportion to the total amount of water purchased by each such water user for use in such year. However, as an exception to the first sentence of Paragraph 9.2.1 above, SL AG water is deemed to have become "San Luis Agricultural operation and maintenance" ("SL AG O&M") water to the extent the water was delivered for use to lands subject to the operation and maintenance water rate pursuant to Section 208 of the 1982 Act.

9.2.2. Agricultural water users in Areas 2A and 2B have purchased all the "Mendota Pool agricultural water" ("MP AG") each year in proportion to the total amount of water purchased by each such water user for use in such year.

9.2.3. The remainder of the total amount of water which has been purchased by each agricultural water user in Area 2A and 2B for use in each year has been "San Luis agricultural excess" ("SL AG EX") water.

9.2.4. All the water which has been purchased by agricultural water users in areas annexed to the District after June 29, 1965, has been SL AG EX water.

9.2.5. "Municipal and industrial water users in the District have purchased and used only "San Luis Municipal and Industrial" ("SL MI") water.

9.3. Each water user's bookkeeping account shall also show, as a debit, such water user's share of the total payment by the District of court costs and attorneys' fees and expenses as provided for in Paragraph 19 below. Each water user's share shall be the same proportion of said total payment as the total amount of water purchased by such water user from the District for use during the Bookkeeping Account Period is of the total amount of water purchased by all water users from the District for use during the Bookkeeping Account Period.

9.4. Each water user's bookkeeping account shall also show such water user's net credit or net debit, taking into account the credits and debits described in Paragraphs 9.2 and 9.3 above.

9.5. Each water user having a net debit in such water user's bookkeeping account shall be obligated to pay the District the amount thereof, together with Statutory Interest on the unpaid balance beginning the first day of the month after this Judgment is entered. The District shall take such action as it deems appropriate to collect the amount owed, including but not 'limited to adding such amount to such water user's water purchase payment obligations. The amount collected shall be deposited into and become part of the Overpayment Refund Account established by Paragraph 8.4 above.

9.6. The net credits in the water users' bookkeeping accounts shall be refunded as provided in Paragraphs 9.6.1 through 9.6.3 below.

9.6.1. The total amount of money released to the District from the Existing Trust Fund under Paragraph 8.1 above, less the amount paid for court costs and attorneys' fees and expenses as provided in Paragraph 19 below, shall be apportioned among and paid to all the water users having net credits in proportion to their net credits.

9.6.2. When the required money has been deposited in the Overpayment Refund Account under Paragraphs 8.4 and 9.5 above, the money therein shall be apportioned among and paid by the District as soon as practicable to all the water users having net credits in proportion to their net credits. Upon such payments being completed, said net credits shall be deemed fully refunded.

9.6.3. If the District is unable to locate a particular water user to refund the net credit to which such water user is entitled, the amount due such water user shall be used as determined by the District.

10. Service Area—Area 1B and 2B Rights.

10.1. Area 1B, in addition to Area 1A, is within the authorized service area of the Central Valley Project, including the San Luis Unit and Delta Mendota Canal, and is entitled to the same water supply and the same rights pertaining thereto as Area 1A.

10.2. Area 2B, in addition to Area 2A, is within the authorized service area of the Central Valley Project, including the San Luis Unit and Delta Mendota Canal, and is entitled to the same water supply and the same rights pertaining thereto as Area 2A.

10.3. Areas adjacent to Area 1B or Area 2B which in the; past have been annexed to the District with the consent of the United States are within the authorized service area of the Central Valley Project, including the San Luis Unit and Delta Mendota Canal.

11. Improvement Districts and Future Contracts.

11.1. The District shall initiate proceedings to form an improvement district encompassing all of Area 2A and Area 2B plus lands annexed to the District after June 29, 1965, for the purpose, among other things, of contracting with the United States for water service to serve solely the lands

therein. The District also may initiate proceedings to form one or more improvement districts encompassing all or certain portions of the same territory described in the preceding sentence for the purpose, among other things, of contracting with the United States for construction of water distribution facilities or collector drainage facilities to serve the lands therein.

11.2. The District shall, with Area I concurrence as provided in Paragraph 22.5 below, initiate proceedings in the future to form one or more improvement districts encompassing all or certain portions of Area lA and Area 1B for the purpose, among other things, of contracting with the United States, if and when appropriate, for completion of a collector drainage and water distribution system to serve the lands therein.

11.3. For any improvement district of the District to be eligible to contract with the United States for any purpose referred to in Paragraphs 11.1 and 11.2 above, it must qualify as an "organization" under Section 2(g) of the 1939 Act, and to be eligible to contract with the United States for the purpose of construction of collector drainage or water distribution facilities, it must be of such size and configuration as the Secretary of the Interior reasonably determines constitutes a logical area for such purpose. Upon any improvement district of the District entering into a contract with the United States for any purpose referred to in Paragraph 11.1 and 11.2 above, the contracting improvement district, but not the portion of the District outside such contracting improvement district, shall, if required by Section 203 (a) of the 1982 Act, become subject to the discretionary provisions of the 1982 Act by virtue of entering into said contract.

11.4. Neither the District nor any improvement district of the District shall enter into any future contract with the United States as described in Section 203(a) of the 1982 Act (a) without approval of the voters of the District or improvement district thereof, as appropriate, by two-thirds of the votes cast, and (b) until the latest date reasonably necessary, which, in the case of a future contract with the United States for completion of a collector drainage system to serve lands in Area IA and Area 1B, shall be the latest date which would enable completion of such collector drainage system by the time Drainage Service Facilities are completed and ready to receive and dispose of drainage therefrom.

11.5. The entry into and performance of any water service contract between the United States and any improvement district of the District pursuant to this Judgment shall create no rights, preferences or priorities as to water service between lands in the Original Westlands District and lands in the Former Westplains District after the term of this Judgment.

12. Cooperation Between District and Federal Parties.

12.1.1. Reference is made to the recital of facts in Paragraph 5.1 above. Subject to all the requirements of this Judgment and the law, including the applicable provisions of the National Environmental Policy Act ("NEPA"), Federal reclamation law and the Administrative Procedure Act, including their requirements respecting agency decision-making, the Federal Parties shall, with the cooperation of the District, enter into a long-term contract under Section 9(e) of the 1939 Act on behalf of the United States with an improvement district of the District encompassing all of the territory described in Paragraph 11.1 above, for the firm annual delivery of the amounts of Central Valley Project water referred to in Paragraph 5 above at the rates specified in that paragraph for a term expiring no sooner than December 31, 2007; provided, that in the event of an alleged breach of the provisions of this Paragraph 12.1.1 by the Federal Parties, the remedies available to a party shall be limited to: (1) the revival of any claim otherwise preserved pursuant to Paragraph 14.1.1, below, or (2) the bringing of a new action pursuant-to the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

12.1.2. Subject to all requirements of this Judgment and the law, including the applicable provisions of NEPA, Federal reclamation law and the Administrative Procedure Act, including their requirements respecting agency decision-making, and subject to any necessary congressional authorization, the availability of funds appropriated by the Congress, and the execution of an appropriate repayment or loan contract between the United States and the District or an improvement district of the District that is approved by the Secretary pursuant to Paragraph 11.3 above, the Federal Parties will make a good faith effort to construct water distribution and collector drainage facilities needed in the District in addition to those constructed under the 1965 Contract; provided, that the sole remedy available to a party for an alleged breach of this Paragraph 12.1.2 by the Federal Parties shall be limited to pursuing a claim as described in Paragraph 14.1.8 below.

12.2. With reference to the portion of the District encompassing Areas 2A and 2B plus lands annexed to the District after June 29, 1965, the provisions of Paragraph 12.3 below are included in this Judgment in light of the facts recited in Paragraphs 12.2.1 through 12.2.6 below, as agreed to by the parties.

12.2.1. In addition to any water obtained by contract pursuant to Paragraph 12.1.1 above, any water available to such portion of the District under Paragraphs 5 above and 17.3 below, and the limited available groundwater supply, such portion of the District needs an additional annual supplemental water supply of 100,000 acre feet or more in order to provide it a total water supply adequate to sustain the existing agricultural development.

12.2.2. That need for an additional annual supplemental water supply to Areas 2A and 2B has been acknowledged by

the Federal Parties and the District since before the merger of Former Westplains District and Original Westlands District in 1965.

12.2.3. Such portion of the District currently has no water supplies available to it other than those described in Paragraph 12.2.1 above.

12.2.4. Such portion of the District is within the authorized service area of the Central Valley Project.

12.2.5. Additional water service can be provided to such portion of the District from the Central Valley Project through the existing main conveyance facilities of the Central Valley Project, to the extent such service does not interfere with the furnishing of Central Valley Project water to contract entities in the San Felipe Division, Central Valley Project.

12.2.6. Such portion of the District has the financial ability and is willing to pay the United States the applicable rates for an additional annual supplemental water supply from the Central Valley Project.

12.3. At such time as additional Central Valley Project water becomes available for long-term contracting, the Federal Parties, subject to all requirements of law and the then-prevailing Bureau of Reclamation water marketing policy, shall make a good faith effort to provide for delivery of an additional annual supplemental water supply to an improvement district encompassing such portion of the District or, if no such improvement district then shall exist, to the District, under mutually agreeable contract terms and conditions; provided, that nothing in this Paragraph 12.3 shall be deemed to confer upon either such improvement district or the District any priority right to such additional water vis a vis any other potential or competing users of available Central Valley Project water; provided further, that in the

event of an alleged breach of the provisions of this Paragraph 12.3 by the Federal of a new action pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*.

13. Repayment of Funds Expended Under P.L. 95-46

13.1. The provisions of Paragraphs 13.2 and 13.3 below are included in light of the facts recited in Paragraphs 13.1.1 through 13.1.5 below, as agreed to by the parties.

13.1.1. Public Law 95-46, enacted June 15, 1977; authorized to be appropriated and to be committed for expenditure by the Secretary of the Interior the sum of $31,050,000 (hereinafter "P.L. 95-46 funds") for continuation of construction of distribution systems and drains on the San Luis Unit, Central Valley Project. But said statute prohibited the Secretary from expending any of those funds prior to obtaining a pledge of the Board of Directors of the District indicating its intent to repay costs associated with the construction authorized by said statute.

13.1.2. On May 13, 1977, in anticipation of the enactment of Public Law 95-46, the Board of Directors of the District adopted Resolution No. 549-77 wherein it pledged to take all steps necessary to insure repayment by the District of expenditures of funds by the United States on behalf of the District pursuant to said statute. On June 23, 1977, the District mailed a certified copy of that Resolution to the Federal Parties. That copy was received by the Federal Parties on June 27, 1977, and was immediately accepted by the Federal Parties as the pledge of the District Board of Directors described in said statute.

13.1.3. Thereafter, in 1978, the Congress commenced the appropriation and the Federal Parties commenced the expenditure within the District of P.L. 95-46 funds, and the District accepted the benefits thereof.

13.1.4. By virtue of the foregoing, the District became and still remains contractually obligated at law to repay to the United States all P.L. 95-46 funds, expended on the District's behalf, on such terms as are required by Section 9(d) of the 1939 Act and were, at that time, customarily used in repayment contracts between the United States and water districts under said section.

13.1.5. To date, the Federal Parties have expended $22,027,371 of P.L. 95-46 funds to construct distribution and collector drainage facilities in the District and intend to expend the remaining $9,022,629 of said funds to construct additional distribution and collector drainage facilities within the District to the extent such funds are now or hereafter become available.

13.1.6. Exhibit K attached hereto and incorporated herein by reference includes the terms customarily used in repayment contracts between the United States and water districts under Section 9(d) of the 1939 Act at the time the contractual obligations referred to in Paragraph 13.1.4 arose.

13.2. The terms of the contractual obligations between the District and the United States with respect to the expenditure and repayment of P.L. 95-46 funds within the District are set forth in Exhibit K.

13.3. As set forth in Exhibit K:

(a) The adjusted refund to which the District is entitled under Paragraph 8.2 above is applied as a credit against the expenditure of P.L. 95-46 funds to date of $22,027,371, and the District's contractual obligation is thereby repaid to the extent of that credit.

(b) The remaining amount of P.L. 95-46 funds expended to date shall be repaid by the District in 28 equal semi-annual installments on January 1 and July 1 each year beginning July 1 of the year after this Judgment is entered.

(c) Upon completion of expenditure by the United States of the presently unexpended remainder of P.L. 95-46 funds, said remainder shall be repaid by the District to the United States in 40 equal semi-annual installments on January 1 and July 1 each year beginning July 1 of the year following such completion of expenditure.

14. Claims Preserved and Claims not Affected by Judgment.

14.1. Notwithstanding this Judgment and the parties' voluntary dismissal of all claims for relief pleaded in these present actions, the claims described in Paragraphs 14.1.1 and 14.1.2 below, and the right to judicial relief with respect thereto in other actions, are preserved, and the claims described 1 in Paragraph 14.1.3 through 14.1.8 below are not affected by this Judgment.

14.1.1. Any claim of (a) a long-term right to the water service provided for in Paragraph 5 above at an agricultural water service rate of $7.50 per acre foot, and (b) if such a right is held not to exist, a right to recover the costs of operation and maintenance of the Pleasant Valley (Coalinga) Canal and Pumping Plant incurred by the District; provided, that such claims may be asserted only if the Federal Parties do not offer the District or an improvement district of the District encompassing Areas 2A and 2B a contract as described in Paragraph 12.1.1 above within a reasonable time prior to the expiration of the term of provisional water service provided for in Paragraph 5.2.4 above.

14.1.2. Any claim against the United States of the right to drainage service or Drainage Service Facilities, including but not limited to any claim by the District of the right to recover District costs of providing Drainage Service Facilities; provided, that the right to drainage service or Drainage Service Facilities which may be claimed against the United States

during the term of this Judgment shall be limited to the removal and disposal of not to exceed 100,000 acre feet per year of subsurface agricultural drainage water from the District; provided further, that such claim may be asserted only upon the occurrence of one of the conditions specified in Para-graphs 7.1.8.1 through 7.1.8.8 above.

14.1.3. Any claim that the second sentence of Section 203(b) of the 1962 Act is invalid or inapplicable to lands within the District.

14.1.4. Any claim challenging the authority of the United States or the Federal Parties to sell excess lands under Federal reclamation law, including but not limited to the right to assert, subject to Paragraph 7.4 above, that provision for the Drain as set forth in the 1960 Act is a condition of the exercise of that authority.

14.1.5. Any claim that a contract referred to in Paragraph 11.2 above is not a contract as described in Section 203(a) of the 1982 Act.

14.1.6. Any claim of any landowner or water user against the United States arising out of or relating to Exhibit H which (a) sounds in tort, or (b) has been asserted in any other action pending on the date of execution of the Stipulation for Compromise Settlement from which this Judgment arose, or (c) seeks declaratory relief about the interpretation of the terms of Exhibit H.

14.1.7. Any claim of any landowner or water user against the District arising out of or relating to Exhibit H, drainage service, or Drainage Service Facilities.

14.1.8. Any claim of a party against the United States of a legal right to have additional water distribution or collector drainage facilities constructed within the District in addition to those constructed pursuant to the 1965 Contract; provided, that such claim may be asserted only in the event that the

Federal Parties fail to perform in accordance with the terms of Paragraph 12.1.2 above, and not otherwise.

14.2. The claims referred to in Paragraphs 14.1.1 through 14.1.8 above shall be subject to all available defenses, except that the running of time respecting the defense of statute of limitations and laches to the claims referred to in Paragraph 14.1.1 and 14.1.2 above shall be tolled between the date this Judgment is entered and the first date when such claim may be asserted.

15. Past Contracts, Water Allocation and Pricing.

All parties have voluntarily dismissed with prejudice all claims for relief pleaded in these actions arising out of any Interim Contract, Exhibit H, any Internal Allocation Rule or any Internal Pricing Rule, except that the District and the United States retain any claim for relief arising out of Exhibit H. No party shall recover any damages or obtain any other judicial relief in any action against any other party based on such past actions, except as provided in Paragraphs 6 and 9 above and Exhibit H. Notwithstanding the foregoing, any landowner or water user may assert in any other action any claim for relief referred to in Paragraphs 14.1.6 and 14.1.7 above and seek any remedy provided by law with respect thereto.

16. Future Contracts—Rights Under Merger Law.

Subject to the provisions of this Judgment and during its term, neither the District nor any improvement district of the District shall enter into any future water service, repayment or other contract, or perform under such contract, so as to impair the rights to which the 1A and 1B Parties are entitled pursuant to the Merger Law.

17. Future Water Allocation and Pricing.

17.1. Subject to the provisions of this Judgment and during its term, neither the District nor any improvement district of the District shall adopt any future Internal Allocation Rule or Internal Pricing Rule, or enforce any such rule, so as to impair the rights to which the IA Parties and 1B Parties are entitled pursuant to the Merger Law.

17.2. The IA Parties and 1B Parties shall have the first and prior right to timely apply for and purchase from the District the entire quantity of water to which the District is entitled under the 1963 Contract. Except as provided in the preceding sentence and in Paragraphs 17.3 and 17.5 below, by virtue of the Merger Law the District shall adopt no Internal Allocation Rule in the future which allocates to Area IA and Area 1B less than such quantity of water.

17.3. Any water delivered to the District under the 1963 Contract not purchased by water users in Area 1A and Area 1B shall be allocated ratably among water users in Area 2A and Area 2B which timely apply for and purchase such water from the District.

17.4. Any water delivered to the District by the United States for use within the District in addition to water delivered under the 1963 Contract, including but not limited to water delivered under Paragraph 5 above and under the water delivery contracts referred to in Paragraphs 12.1.1 and 12.3 above, shall be allocated ratably among water users in Area 2A and Area 2B which timely apply for and purchase such water from the District.

17.5. In years of water shortage when water deliveries to Central Valley Project water contractors are reduced by the Federal Parties under their respective water service contracts, deliveries to and within the District of water purchased under Article 3 of the 1963 Contract to which the water users in Area IA and Area 1B have prior rights shall be proportionally

reduced along with deliveries to and within the District of the additional water from the Central Valley Project to which lands in the District are entitled.

17.6. Except as provided in Paragraph 7.3.1 above and Paragraph 18 below, the District shall not charge any water user more for water service or Drainage Service than the charges required to be paid to the United States for such service, plus any appropriate District charges to cover District costs reasonably necessary in making such service available within the District and in operating the District, including but not limited to compliance with this Judgment. Except as required by the 1982 Act and as provided in Paragraph 18 below, the District shall adopt no Internal Pricing Rule in the future which imposes a water service charge for the water allocated to Area 1A and Area 1B which is greater than the price of water which the District is obligated to pay under the 1963 Contract, plus the appropriate District charges referred to in the preceding sentence.

18. District Financing and Expenditures for Drainage Purposes.

18.1. Notwithstanding anything to the contrary in Paragraphs 7.6 and 17.6 above or elsewhere in this Judgment, the District may raise money to be expended for any drainage purpose either by assessments on land or by charges for service or by a combination of both assessments and charges, as authorized by law, subject, however, to the conditions and limitations set forth in Paragraphs 18.2 through 18.5 below.

18.2. In levying any such assessments, the District shall apportion them as authorized by law, including but not limited to Water Code Sections 36577 and 36578.

18.3. In fixing any such charges, the District shall, if appropriate, equitably vary the amounts in different localities of the

District to correspond to the cost and value of the service involved as authorized by law, including but not limited to Water Code Section 35470.

18.4. Before deciding on a major expenditure for any drainage purpose, the District shall give all water users (and, if appropriate, all landowners) reasonable notice of, and opportunity to submit views to the District regarding, the proposed drainage purpose, the estimated amount of the expenditure, the proposed method of raising money to finance it, who will ultimately bear the cost, and any other relevant information. If, by reason of circumstances beyond the control of the District, there is insufficient time to give such notice and opportunity to all water users, the District shall give such notice and opportunity to the Area I and Area II representatives.

18.5. Area I and Area II concurrence, as provided in Paragraph 22.5 below, shall be required before the District may raise money or make appropriate expenditures for any drainage purpose, except that such concurrence is not required to raise money or make expenditures reasonably necessary (a) to comply with obligations arising from statutes and court and administrative judgments, orders and regulations, and from existing con-tracts, and (b) to make drainage service provided by the United States available within the District.

19. Payment of Court Costs and Attorneys' Fees and Expenses.

Except as set forth herein, each party shall bear his or its own court costs and attorneys' fees and expenses. The District shall pay the class representatives their court costs and reasonable attorneys' fees and expenses as approved by the District for the representation of their respective classes. The District shall also pay West Haven Farming Company its reasonable attorneys' fees and expenses as approved by the

District for its assistance in achieving settlement of these actions, and shall also pay Kings County Development Company Shareholders Liquidating Trust, successor in interest to Kings County Development Company, Stephens Investments Inc. et al, Chevron U.S.A. and Southern Pacific Land Company, et al their respective 1 reasonable attorneys' fees and expenses up to $25,000 each as approved by the District for the assistance each has provided in achieving settlement of these actions. Said payments shall be made by the District from the money released from the Existing Trust Fund under Paragraph 8.1 above before said money is used to refund water users for their net credits.

20. Fifty Cents Per Acre Foot Drainage Service Charges.

No party or water user shall be entitled to reimbursement of any $0.50 per acre foot drainage service charge paid in the past.

21. Pleasant Valley (Coalinga) Canal and Pumping Plant.

Neither the District nor any water user or landowner therein has any right against the United States or the Federal Parties to any refund of the costs of operation and maintenance of the Pleasant Valley (Coalinga) Canal and Pumping Plant which the District has assumed in the past. The District shall retain the responsibility for such operation and maintenance until the end of 2007, as long as the Federal Parties continue to deliver to the District the quantities of Central Valley Project water specified in Paragraph 5 above at the rates specified therein. The IA Parties and 1B Parties shall have no relief against the District or against the 2A Parties and the 2B Parties with respect to the manner in which the District has heretofore charged its water users for said costs under any Internal Pricing Rule. The District shall adopt no Internal Pricing Rule in the future which passes on the District's share of such charges on any other than a uniform basis throughout the District.

22. Termination of Classes and Authorization of Area Representatives.

22.1. The Area 1A, 1B, 2A and 2B Classes are hereby terminated and the representatives heretofore certified as representatives thereof are hereby discharged. In lieu thereof, Area representatives are hereby authorized to represent the two major areas of the District, Area I and Area II, for purposes of enforcement of this Judgment under Paragraph 3 and Area concurrence under Paragraphs 4.3, 7.1.1, 7.1.9, 7.6, 11.2, and 18 above.

22.2. The representatives of Area I shall initially be Boston Ranch Company, Edwin O'Neill, Frank Orff, Y. Stephen Pilibos and Fabry Farms. The representatives of Area II shall initially be Vista Verde Farms, Inc., Price Giffen & Associates, Jim Lowe Inc., Woolf Farming Company of California, Inc., and Perez Ranches Inc.

22.3. Any representative of either such Area shall automatically lose status as such and shall no longer have any powers or duties as a representative of such Area hereunder upon the happening of either (a) the cessation of such representative's juridical existence, including the death or adjudication of incompetence of a natural person, or the dissolution of a corporation, or (b) the cessation of such representative's ownership and operation of land within the Area of which he is a representative. Upon the occurrence of such vacancy, the remaining representatives of the affected Area owning or operating at least a majority of the assessed value of all the lands within such Area which are owned or operated by all the remaining representatives of such Area shall select a successor representative willing to so serve. The name of the successor representative shall be certified to the District by the representatives who have selected the successor. The District shall maintain an up-to-date list of the names and addresses of all Area representatives and the assessed value of the lands owned or operated by each.

22.4. The Court retains jurisdiction to remove or replace one or more of the representatives of an Area for good cause on motion of a landowner or water user within such Area. Notice of such motion shall be served upon all the representatives of such Area and upon the District.

22.5. Concurrence of an Area with District action, as required in Paragraphs 4.3, 7.1.1, 7.1.9, 7.6, 11.2 and 18 above, shall be deemed to have been obtained as follows:

The District shall give every Area representative of each Area for which concurrence is required for a particular action written notice of such action by certified mail. If, within 30 days after such notice has been mailed, the District has not received written objection to such action from representatives owning or operating at least a majority of the assessed value of the land owned or operated within such Area by all the representatives thereof, concurrence of such Area shall be deemed to have been obtained. If, however, within said 30 days the District has received such written objection, concurrence shall be deemed not to have been obtained, except as follows with regard to the concurrence required under Paragraphs 7.1.1, 7.1.9, 7.6, 11.2 and 18 above but not under Paragraph 4.3 above: The District may call an advisory election within such Area pursuant to the California Water District Act and the California Elections Code on the question of concurrence. If a majority of the votes cast in such election are in favor of concurrence, concurrence shall be deemed to have been obtained.

23. Judgment and Stipulation for Compromise Settlement Not a Contract.

Neither this Judgment nor the Stipulation for Compromise Settlement is a contract or an amendment to a contract with the United States as described in Section 203(a) of the 1982 Act.

24. No New United States Drainage Service Obligation.

Nothing in this Judgment or the Stipulation for Compromise Settlement shall be deemed to create any obligation of the United States to provide any drainage service to the District or to construct Drainage Service Facilities for the District, and any claim that the United States has a preexisting obligation with respect to drainage service or Drainage Service Facilities may be brought by the District in accord with Paragraph 14.1.2 and not otherwise.

25. Application of Certain Paragraphs.

The provisions of Paragraphs 11.4, 16, 17 and 22 are intended to, and shall, apply only among the District, the 1A Parties, the 1B Parties, the 2A Parties and the 2B Parties and are not intended to benefit the United States.

Dated: _____.

_____
United States District Judge

[Exhibits and Proof of Service Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-93-5327 OWW SSH

WESTLANDS WATER DISTRICT, SAN BENITO COUNTY WATER DISTRICT, SAN LUIS WATER DISTRICT, AND PANOCHE WATER DISTRICT,

Plaintiffs,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF INTERIOR, BUREAU OF RECLAMATION, UNITED STATES OF AMERICA, DEPARTMENT OF COMMERCE, NATIONAL MARINE FISHERIES SERVICE, UNITED STATES OF AMERICA, DEPARTMENT OF INTERIOR FISH AND WILDLIFE SERVICE, RONALD H. BROWN, SECRETARY OF COMMERCE, BRUCE BABBIT, SECRETARY OF THE INTERIOR,

Defendants.

MEMORANDUM OPINION AND ORDER
RE: MOTION TO DISMISS COMPLAINT

I. Introduction

Plaintiffs Westlands Water District, San Benito County Water District, Panoche Water District and San Luis Water District ("Districts") move to dismiss their Seconded Amended Complaint in its entirety without prejudice, pursuant to Fed. R. Civ. P. 41(a)(2). All parties except the Area I Intervenors ("Area I") have previously stipulated to the dismissal of Plaintiffs' remaining claims. Area I Intervenors refused to agree to the stipulation, and now oppose the motion to dismiss. Federal Defendants support the motion for dismissal and have made a joint response to the Area I opposition.

II. Background

The Districts filed an action for injunctive relief and damages on May 17, 1993 challenging several actions taken by the Federal Defendants under the Central Valley Project Improvement Act ("CVPIA"), Title XXIV of Pub. L. No. 102-575, 106 Stat. 4606 and the Endangered Species Act ("ESA") 16 U.S.C. §§ 1531-1544. The Districts filed a Second Amended Complaint in March 1994 with eight causes of action "challenging the reduction in deliveries of water and impending assessments by the Federal Defendants." The Districts also alleged violations of the National Environmental Protection Act ("NEPA"), 42 U.S.C. §§ 4332 et seq. The Federal Defendants filed an answer to the Second Amended Complaint.

Several parties joined the action as Intervenors. The Environmental Intervenors and the Exchange Contractor Intervenors joined in September 1993. Area I Intervenors joined in October 1993 and Grassland Intervenors joined in June of 1994.

Subsequent to several negotiations and agreements, among them the December 15, 1994 Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government, all of the parties to the action stipulated to the dismissal of the NEPA portion of the plaintiffs' second claim for relief, as well as to the third through seventh claims for relief in the Second Amended Complaint. *See* Omnibus Stipulation re Dismissal of ESA Claims and Complaint-in Intervention and Order Thereon (Filed May 23, 1995).

On June 30, 1995 plaintiffs notified the court that they intended to dismiss this action. Plaintiffs circulated a letter of stipulation to counsel for defendants and intervenors which provided for the dismissal without prejudice of the remaining claims. With the exception of Area I Intervenors, counsel for all defendants and the remaining intervenors agreed to the

stipulation. In light of the Area I Intervenors' objection to the stipulation, the Districts have filed this motion to dismiss without prejudice.

III. Standard

Rule 41(a)(2) allows a plaintiff, with the approval of the court, to dismiss an action without prejudice at any time:

> Except as provided in paragraph (1) of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper . . .

Fed. R. Civ. P. 41(a)(2). A motion for voluntary dismissal under Rule 41(a) (2) is addressed to the district court's sound discretion. *Stevedoring Servs. of Am. v. Armilla Int'l*, 889 F.2d 919, 921 (9th Cir. 1989).

A motion for voluntary dismissal should be granted unless the defendant can show that it will suffer some plain legal prejudice as a result. *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987); *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982). Plain legal prejudice may be shown where actual legal rights are threatened or where monetary or other burdens appear to be extreme or unreasonable. *Watson v. Clark*, 716 F. Supp. 1354, 1356 (D. Nev. 1989), *aff'd*, 909 F.2d 1490 (9th Cir. 1990). Factors to consider in determining legal prejudice are:

(1) The defendant's effort and expense involved in preparing for trial;

(2) Excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action;

(3) Insufficient explanation of the need to take a dismissal; and

(4) The fact that summary judgment has been filed by the defendant.

Pauluccci v. City of Duluth, 826 F.2d 780, 783 (8th Cir. 1987); *see also, Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6th Cir. 1994); *United States v. Outboard Marine Corp.*, 789 F.2d 497, 502 (7th Cir. 1986). The prejudice resulting from uncertainty over title to land is also a valid consideration. *Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir. 1974). Plain legal prejudice does not occur where the defendant merely faces the threat of a second lawsuit or a tactical disadvantage. *Hamilton*, 679 F.2d at 145.

The suit may be dismissed with or without prejudice, and the dismissal may be conditioned on terms that are proper or necessary to avoid prejudice to the defendant. See *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993).

IV. Discussion

Plaintiffs (Districts) base their motion for dismissal without prejudice on Fed. R. Civ. P. 41(a)(2). The Districts state that no party will suffer legal prejudice resulting from a dismissal. They note that all of the defendants and intervenors except for those of Area I, have agreed to stipulate to the dismissal of plaintiffs' remaining claims. Citing the Order after Scheduling Conference, filed May 19, 1995 at 3, the Districts argue that Area I Intervenors may pursue any claims by severing their existing complaint in intervention or by filing a new lawsuit.

In their response, Area I Intervenors do not take a position as to the dismissal of the claims brought by the plaintiffs San Benito County Water District, San Luis Water District, and Panoche Water District. However, to the extent the motion is brought on behalf of the Westlands Water District (Westlands), Area I Intervenors have three arguments: 1) The court should not dismiss the action. However if it does, it should name the Area I Intervenors as plaintiffs succeeding to all

Westlands claims for relief; 2) The court should not dismiss claims one and eight of the Second Amended complaint, but if it does, such dismissal should be conditional upon Westlands assisting Area I Intervenors in pursuing the claims; and 3) Dismissal of Westlands' claims two through seven should be made only on condition that they do not prejudice Area I water users' rights.

A. Objection to Dismissal and Request for Plaintiff Designation

Area I Intervenors argue that the court should not dismiss the case because it would result in uncertainty as to water rights. Area I Intervenors state that in the past the court has denied a plaintiff's motion to dismiss because uncertainty over water rights would prejudice the defendants. *Citing Westlands Water District v. Patterson*, 1995 WL 548344 (E.D.Cal. August 9, 1995), at 4.

The Area I Intervenors read the court's *Westlands* holding too narrowly. The court's refusal to dismiss in *Westlands* was based on a variety of factors, among them: prejudice to defendants, and that the case was ripe for review. Id. The instant case is distinguishable. Defendants do not argue that they will suffer any prejudice; indeed, they have stipulated to the dismissal. Furthermore, the case is not ripe for review. Plaintiffs note that there has been no discovery, designation of witnesses, or motions for summary judgment relating to the Districts' remaining claims.

Area I Intervenors argue that dismissal of the case would lead to continued confusion of critical statutory issues. They maintain that continuing this case with the current parties will provide for efficient judicial resolution of the water allocation problem. *citing Barcellos and Wolfsen v. Westlands Water District*, 849 F. Supp. 717, 725 (E.D. Cal. 1993) "the proper forum to raise Movants' remaining issues is a separate suit in which all the necessary parties are named. . ." and *O'Neill v.*

U.S., 50 F.3d 677, 689 (9th Cir. 1995) "[A] decision will enable a comprehensive judicial resolution of the allocation problem which affects many parties other than Area I."

Area I's argument ignores the fact that all the parties have stipulated to the dismissal of the complaint. The Federal Defendants argue that the negotiated Delta Accord has provided for the satisfactory resolution of the water issues. The court cannot compel parties to bring a suit. Indeed, public policy and judicial economy dictate encouraging settlement of complaints. Any uncertainties, to the extent that they remain, may be addressed by Area I Intervenors in proceeding with their present claims or by amending their complaint.

As a final point to their first argument, Area I parties contend that if the court grants the motion to dismiss the complaint, it should do so only upon the condition of redesignating Area I intervenors as plaintiffs succeeding to Westlands' claims.

Area I Intervenors misunderstand the nature of Fed. R. Civ. P. 41(a)(2). A motion for voluntary dismissal should be granted unless a defendant can show that it will suffer some plain legal prejudice as a result. *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987); *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982). Not one of the defendants here maintains that it will suffer legal prejudice. Similarly, Area I, as plaintiffs-in-intervention, do not demonstrate plain legal prejudice will result from a dismissal of the action. Mere inconvenience does not constitute plain legal prejudice. *Hamilton v. Firestone*, 679 F.2d 143, 145 (9th Cir. 1982). The action is dismissed as to Westlands without prejudice.

A dismissal under 41(a)(2) is a dismissal of the "action" not just of certain claims. If Area I Intervenors wish to amend their complaint they may be designated as Plaintiffs.

By the May 19, 1995 order, Area I parties were directed to consult with the government and determine whether any remaining claims they wish to assert are best advanced by severing their existing complaint in intervention, or by filing of a new lawsuit." Order after Scheduling Conference, at 3. The court directed the Exchange Contractors to make the same determination. Since that time, the Exchange Contractors have filed an amended complaint. See First Amended Complaint in Intervention of San Joaquin River Exchange Contractors Water Authority, filed August 29, 1995. Area I Intervenors are likewise free to proceed with their existing claims or to file an amended complaint.

B. Specific Objection to the Dismissal of Claims One and Eight

Area I objects to the dismissal of Westlands' first and eighth claims. The first claim for relief generally alleges that Westlands has vested property rights in a continued water supply, the plan to reduce delivery in order to satisfy the CVPIA and ESA requirements deprives Westlands of such vested rights, and such reductions violate Westlands' due process rights. The eighth claim for relief alleges that the Bureau of Interior must obtain modification of the state water right permits to obtain water reallocation, that the Bureau reallocated such water without obtaining prior modification, and that doing so violated federal reclamation laws.

As stated above, a court should grant a plaintiff's motion to dismiss unless a defendant can show that it will suffer some plain legal prejudice. *Waller* 828 F.2d at 583; *Hamilton*, 679 F.2d at 145. Lacking a demonstration of actual legal prejudice to defendants, Westlands' motion to dismiss this action as to all claims must be granted.

In the event that the motion to dismiss claims one and eight is granted, Area I Intervenors request that the dismissal be conditioned upon Westlands' assisting Area I in its prose-

cution of the case by: 1) making all witnesses and experts available; 2) not taking any action that would compromise or prejudice any water users' rights to water; and 3) bearing the costs and reasonable fees of litigation.

Area I Intervenors assert only one case in support of their witness availability proposition. *duPont Glore Forqan, Inc. v. Arnold Bernhard & Co.*, 73 F.R.D. 313, 315 (S.D.N.Y. 1976). That case is distinguishable. *duPont* was a securities case where a motion was made under Fed. R. Civ. P. 21 to drop a corporate defendant from a suit. The court found that none of the other defendants was prejudiced by the dismissal of the corporate defendant from the suit. *Id.* As part of its granting the motion to drop the corporate defendant, the court required the corporate defendant to make material witnesses available at trial. The costs of making the witnesses available were borne by those who used the witnesses.

This case differs. No witnesses or circumstances which necessitate ordering Westlands' witnesses to cooperate with Area I are identified. Nor are any specific conditions of cooperation identified. The case is in an early stage, a long way from designating witnesses for trial. Finally, Area I parties do not agree to pay the witness costs, but wish to shift them to the Districts.

In support of their demand that the Districts bear the costs and reasonable fees of litigation, Area I Intervenors further argue that the water rights are a trust estate held by Westlands as trustee for Area I beneficiaries. If Westlands fails to protect the water rights and Area I parties protect it instead, the Area I parties may demand reimbursement for their costs.

The court has discretion as to the conditions it imposes on dismissal. "The terms and conditions that may be imposed under Rule 41(a)(2) are not limited to the payment of money." Wright and Miller Federal Practice and Procedure § 2366.

Despite the discretion to impose appropriate conditions on dismissal, the issue of Westlands alleged trust relationship to Area I parties cannot be determined on this motion. Area I seeks to hold Westlands responsible for open-ended, undetermined litigation expenses on the theory that Westlands may benefit from Area I's successful prosecution of this lawsuit. Area I's request for a decision they are entitled to be compensated by Westlands is premature. The substantial benefit theory on which the Area I Intervenors rely is "based on the premise that a successful plaintiff should be able to spread the costs of his litigation among those who benefited from the successful outcome." *Southerland v. Intern. Longshoremen's, Local 8*, 845 F.2d 796, 798 (9th Cir. 1987). Area I Intervenors have yet to be determined "successful;" "benefits" to Westlands have yet to be demonstrated. Area I is not at this time entitled to an advisory order for payment of its litigation costs by Westlands.

C. Conditional Dismissal of Claims Two through Seven

Area I Intervenors do not object to the dismissal of Westlands' claims two through seven so long as it does not prejudice their right to file a summary judgment motion on all claims and issues as to which Westlands filed such motions.

Plaintiffs and Federal Defendants note that a portion of the second claim, and all of third through the seventh claims have been previously dismissed by the court pursuant to the stipulation of all parties to the action. *See* Omnibus Stipulation re Dismissal of ESA Claims and Complaint-in-Intervention and Order Thereon filed May 23, 1995. Area I Plaintiffs signed such a stipulation agreeing to the dismissal of those claims.

The stipulation did contain language stating, "This dismissal shall not affect any rights of the Area I Intervenors." *Id.* at

2. Area I Intervenors may assert such rights through an amended complaint. The dismissal of Westlands' claims shall not be interpreted to the prejudice of any other party.

V. Conclusion

For the foregoing reasons, Westlands' motion to dismiss their complaint is GRANTED, without prejudice. Westlands' counsel shall prepare an order in conformity with this memorandum opinion and lodge it with the court within five (5) days following date of service of this opinion.

IT IS SO ORDERED.

DATED: November 1, 1995.

/s/ Oliver W. Wanger
OLIVER W. WANGER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CIV No. 93-5327-OWW/SSH

FRANCIS A. ORFF, BROOKS FARMS II BROOKS FARMS IV, BROOKS FARMS V, G.S. FARMS, FIVE-D WESTSIDEFARMS, INC., R & S FARMING, CARDELLA RANCH, GRAMIS FAMILY FARMS II, EDWIN R. O'NEILL, BRO PARTNERSHIP, BTO PARTNERSHIP,EJC PARTNERSHIP, ERO PARTNERSHIP, JEO PARTNERSHIP, SLO PARTNERSHIP, TBO PARTNERSHIP, C.S. STEFANOPOULOS TRUST, ELENA STEFANOPOULOS TRUST, ESTATE OF HELEN STAMOULES, D.D. STEFANOPOULOS TRUST, PAGONA STEFANOPOULOS, SUMNER PECK RANCH, INC., Y. STEPHEN PILIBOS, PILIBOS CHILDREN'S TRUST,
Plaintiffs,

vs.

UNITED STATES OF AMERICA *et al.*,
Defendants.

ORDER RE MEMORANDUM OPINION AND
ORDER RE DEFEFANTS' MOTION TO RECONSIDER

The Court, having considered Federal Defendants' motion to modify the June 5, 1998, Memorandum Decision, on the grounds that Area I Plaintiffs lack standing to sue the Federal Defendants under 43 U.S.C. 390uu which the Court construed as a motion for reconsideration, as well as the opposition filed by the Area I Plaintiffs and the Federal Defendants' reply brief, this Court finds as follows:

1. This suit, which was initially filed by Westlands Water District, San Benito County Water District, San Luis Water District and Panoche in May 1993, alleged

that various actions taken by the Federal Defendants violated the Central Valley Project Improvement Act (CVPIA), and the Endangered Species Act (ESA). Various groups, including the Area I Plaintiffs, intervened. After Westlands et al., moved to dismiss the case without prejudice in September 1995, the Area I Plaintiffs were given leave to file an amended complaint.

2. In their amended complaint, the Area I Plaintiffs alleged that this Court continued to have jurisdiction over their claims pursuant to 43 U.S.C. 390uu. In the June 5, 1998, Order, the Court held that the Area I Plaintiffs were 'intended third party beneficiaries with standing to litigate Westlands' contractual rights" and, further, that under 43 U.S.C. 390uu, the Area I Plaintiffs could seek money damages.

3. The Federal Defendants sought modification of the June 1998 Order on the grounds that 43 U.S.C. 390uu did not provide standing for the Area I Plaintiffs to sue and, second, that claims for money damages in excess of $10,000, the limit under the Little Tucker Act, could not be heard in this Court.

4. The decision in *Klamath Water Users v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), addresses the issue of third-party beneficiaries in the context of a contract between the Bureau of Reclamation and a utility. Given the new Ninth Circuit case law, this Court concluded that reconsideration of .the third-party beneficiary issue was appropriate.

5. Examining Area I Plaintiffs' claims based on the 1963 contract between the United States and Westlands, this Court finds that the terms of the Contract reveal no intent to create in the water users within the District direct enforcement rights against the United States. This conclusion is supported by Paragraph 4.2 of the 1986

Barcellos Judgment which vested enforcement rights in the District. This Court therefore finds that the Area I Plaintiffs are neither contracting parties nor intended third party beneficiaries of the 1963 Contract between Westlands and the United States.

6. With regard to Area I Plaintiffs' assertion that they have standing to sue under the recordable contracts, the Court notes, first that all recordable contracts have been performed. Moreover, Plaintiffs do not claim breach of any rights under the recordable contracts but, rather, they seek to enforce the terms of the 1963 Contract. However, this Court finds that the provisions of the recordable contracts cited by the Area I Plaintiffs do not grant the Area I Plaintiffs a right to enforce the 1963 Contract. Further, this Court rejects Area I Plaintiffs' argument that 'a breach by the government of the 1963 contract is ipso facto a breach of each recordable contract."

7. With regard to the *Barcellos* Judgment, even if paragraph 3 of the Judgment confers standing, the issue remains whether a suit for money damages can be maintained in light of the Tucker Act 'requirements. The Court finds that the *Barcellos* Judgment evinces an express intent by both parties to render 43 U.S.C. 390uu inapplicable to suits to enforce the terms of the Judgment. Since the Area I Plaintiffs cannot invoke 43 U.S.C. 390uu to enforce the Judgment, the Area I Plaintiffs must point to another source to allow them to sue for money damages.

8. Since Area I Plaintiffs seek money damages that exceed the limits of the Little Tucker Act of $10,000, generally, only the Federal Court of Claims has jurisdiction over money damages in the amounts sought by the Area I Plaintiffs. The Area I Plaintiffs assert that a contract claim for money damages may be asserted

against the United States in a Federal district court "if there is an independent waiver of sovereign immunity." The Area I Plaintiffs assert that this "independent waiver" can be found in Paragraph 3 of the *Barcellos* Judgment. However, examining the provisions of the Judgment recited in Paragraph 3, this Court finds that none of those provisions provides a monetary remedy.

Therefore, the Court hereby ORDERS as follows:

1. The June 5, 1998, holding that Area I Plaintiffs are intended third-party beneficiaries is VACATED.

2. On the Tucker Act issue, whether jurisdiction exists to hear a contract claim for money damages in excess of $10,000 against the United States, the June 5, 1998, ruling is VACATED.

3. Area I's claims are DISMISSED for lack of subject matter jurisdiction or TRANSFERRED to the Federal Court of Claims.

4. Area I Plaintiffs shall, within ten (10) days following the date of service of the Court's Memorandum Opinion shall notify the Court as to whether the Plaintiffs wish to have their money claims transferred to the Federal Court of Claims.

IT IS SO ORDERED.

DATE: 5-8-00

/s/ Oliver W. Wanger
OLIVER W. WANGER
UNITED STATES DISTRICT JUDGE

[Certificate of Service Omitted]

Supreme Court, U.S.
FILED
NOV 24 2004
OFFICE OF THE CLERK

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No. 03-1566

IN THE

Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

The question presented is whether farmers are "intended" third-party beneficiaries of their irrigation district's water service and repayment contracts with the United States Bureau of Reclamation and, therefore, entitled to sue the Bureau for breach thereof, as the Federal Circuit has long held, or merely "incidental" third-party beneficiaries and, therefore, not so entitled, as the Ninth Circuit holds in the decision below.

LIST OF PARTIES

The plaintiffs and appellants below, petitioners here, are Francis A. Orff; Brooks Farms II; Brooks Farms IV; Brooks Farms V; G.S. Farms; Five-D Westside Farms, Inc.; R&S Farming; Cardella Ranch; Gramis Family Farms II; Edwin R. O'Neill, BRO Partnership; BTO Partnership; EJC Partnership; ERO Partnership; JEO Partnership; SLO Partnership; TBO Partnership; C.S. Stefanopoulos Trust; Elena Stefanopoulos Trust; Estate of Helen Stefanopoulos; D.D. Stefanopoulos Trust; Pagona Stefanopoulos; Sumner Peck Ranch, Inc.; Y. Stephen Pilibos; and Pilibos Children's Trust.

Westlands Water District intervened in the Court of Appeals as an appellant.

The defendants and appellees below, respondents here, are United States of America; United States Department of the Interior; Bureau of Reclamation; Fish and Wildlife Service; United States Department of Commerce; National Marine Fisheries Service; Ronald H. Brown, Secretary of Commerce; and Bruce Babbitt, Secretary of Interior.

Parties who intervened below as defendants and appellees are Natural Resources Defense Council; United Anglers of California; Save San Francisco Bay Association; California Waterfowl Association; Sierra Club; Bay Institute of San Francisco; Environmental Defense Fund; California Striped Bass Association; Trout Unlimited of California; Sacramento River Council; California Sportfishing Protection Alliance; Pacific Coast Federation of Fisherman's Associations; the Wilderness Society.

CORPORATE DISCLOSURE STATEMENT

None of the petitioners has a parent corporation nor a nonwholly owned subsidiary.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Orff, et al. v. United States, et al.*, 358 F.3d 1137 (9th Cir. 2004). Pet. App. A. The Ninth Circuit affirmed the district court's unreported Final Judgment, filed August 11, 2000, and Memorandum Opinion and Order re Federal Defendants' Motion to Reconsider, filed April 12, 2000. *Id.* at B, C.

STATEMENT OF JURISDICTION

The Ninth Circuit's judgment was entered February 18, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case presents a question of federal government contract law which is not directly dependent on statute. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 289 (1958), *reh'g denied*, 358 U.S. 805 (1958). However, resolving the question involves various statutes, including Section 8 of the reclamation act of 1902. Pub. L. No. 57-161, § 8, 32 Stat. 388, 390 (June 17, 1902) (codified at 43 U.S.C. §§ 372, 383).

STATEMENT OF THE CASE

A. The Reclamation Legislation: Contract and Property Rights

The Bureau of Reclamation of the United States Department of the Interior constructs and operates water projects in the 17 western states and sells and delivers irrigation water for use by farmers. The reclamation program, under which the Bureau was created, was originally enacted in 1902. Its main purpose was to complete the development of irrigation in the arid west, a task private enterprise had started, but was financially unable to complete. The legislation provided Congress would fund massive irrigation projects involving major

supply works, such as dams, reservoirs, and canals, and local distribution systems. The Bureau's costs of construction and operation and maintenance were to be substantially repaid by land assessments and water charges.[1] The 1902 act also provided that no right to the use of water was to be sold for land exceeding certain acreage limits, thus requiring the benefits of a project to be distributed widely.[2] The 1902 act has been repeatedly amended, including significant reforms in 1922, 1926, 1939, 1956, and 1982.[3]

The quantity of water to be delivered by the Bureau and used by farmers in a service area, and the consideration to be paid by the farmers, are governed by the reclamation legislation, as well as the contracts, state water right permits, and judicial decrees which implement it. In particular, the program depends, in major part, on the contract and property rights which arise in connection with its implementation.[4]

During the first quarter century of the program's existence, the Bureau contracted directly with individual farmers to supply irrigation water. A farmer submitted to the Bureau a

[1] *California v. United States*, 438 U.S. 645, 649, 650, 663-64 (1978).

[2] *Ivanhoe*, 357 U.S. at 292, 297.

[3] The Bureau has built and operates more than 600 dams with over 50,000 miles of canals to deliver water to almost 10 million acres. Amy K. Kelley, *Federal Reclamation Law*, *in* WATERS AND WATER RIGHTS § 41.02 (Robert E. Berk ed., 1996).

[4] "The legislation establishing and expanding these projects has created a highly complex system of rights and interests, some in the Government, some in the districts, some in the individual water users . . . ." *Burley Irrigation District v. Ickes*, 116 F.2d 529, 539 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941). As the case at bar demonstrates, these rights constitute a "complex system" in several respects. Some aspects of the rights are created by federal law, others state law. A right may derive from contract, property, judgment, or statute. Actions of multiple actors—federal, state, and local, as well as private—are involved. And this complex system of rights develops over an extended period of time.

water right application which, upon acceptance, constituted a water right contract between them. LAWS AND REGS. RELATING TO THE RECLAMATION OF ARID LANDS BY THE UNITED STATES, 45 Land Dec. 385, 404, 408 (May 18, 1916). In 1922 Congress provided that the Bureau had the option of entering into a contract with an irrigation district, or with the farmers. 43 U.S.C. § 511. In 1926 Congress provided that no water would be delivered from a new project until a contract had been made with a district organized under state law that provided for payment of the cost of constructing and operating and maintaining the waterworks. *Id.* at § 423e.[5] The legislation also required that owners of excess land shall execute "recordable" contracts with the Bureau in which they agree to sell their land after a certain term at a price which takes no account of the water provided by the project. *Id.* In 1939 Congress delineated the nature and function of "repayment" contracts with districts under which the Bureau recovers the costs (except interest costs) of constructing intra-district distribution works. *Id.* at § 485h(d). The 1939 legislation further provided that the Bureau could also use "service" contracts to recover such costs and the operation and maintenance costs of major supply works. *Id.* at § 485h(e).

Property rights are a key feature of the reclamation program. Section 8 of the 1902 act provides that nothing therein shall be construed to "interfere" with the laws of any state relating to the "control, appropriation, use or distribution" of water used in irrigation, or any "vested right" acquired thereunder; the Bureau, in carrying out its provisions, "shall proceed in conformity with such laws;" and nothing therein shall "affect any right of . . . any landowner, appropriator, or user of water." 43 U.S.C. § 383. Section 8

[5] The purpose of these statutes was administrative convenience, as discussed in point II.D of the Argument. The nature of a water district is discussed in point III.D.

further provides that the "right to the use of water" acquired thereunder shall be "appurtenant to the land irrigated," and "beneficial use shall be the basis, measure, and limit of the right." *Id.* at § 372.[6] Congress reenacted Section 8 in 1956. *Id* at § 485h-4.[7]

B. Foundations of the Water Rights: The Project, Unit, District, and Permits

The Central Valley Project in California was authorized in 1937. Act of Aug. 26, 1937, ch. 832, 50 Stat. 844, 850. The authorizing act provided that reclamation law would govern repayment of costs of necessary works, the Bureau could enter into necessary contracts, and it could acquire necessary water rights. *Id.*

One of the CVP's key features is Shasta Dam at the northern reaches of the Sacramento River. Water collected behind it is released by the Bureau, flows southward to the Sacramento-San Joaquin Delta, and is diverted by opening the gates of a cross channel located in the north of the Delta and, then, lifted from the Delta by means of the Tracy Pumping Plant to flow through the Delta-Mendota Canal to the Mendota Pool on the San Joaquin River for distribution to certain CVP units in the south.[8]

In anticipation of the authorization and construction of the CVP unit at issue here, farmers on the west side of the San Joaquin Valley organized the original Westlands Water District in 1952 under the California Water District Law.

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[6] In the 1926 legislation Congress referred to "the water right attaching to the land." *Id.* at § 423e.

[7] This Court has explicated these property rights statutes in several leading cases, which are discussed in points II.D and III.A of the Argument.

[8] The CVP, as it existed prior to development of the unit involved in this case, is described in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-29 (1950) and *Ivanhoe*, 357 U.S. at 279-84.

Cal. Water Code § 34000 *et seq*. The original District was a 400,000 acre area, where petitioners farm.

California water districts are authorized to contract with the Bureau for an irrigation water supply. *Id.* at §§ 23179, 23195-97, 35400, 35851, 35875, 35878. All water, the right to use of which is acquired by a district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the applicable acts of Congress and the provisions of the contract. *Id.* at § 23200. A water district is authorized both to charge water users for service and to assess the lands they own or operate. *Id.* at §§ 35470, 35474, 36550 *et seq*.

Under the law of the arid western states, surface water is appropriated and distributed under the doctrine of prior appropriation.[9] California law requires any appropriator, including the Bureau, to apply for and obtain a permit from the State Water Resources Control Board. Cal. Water Code §§ 1201, 1250.[10]

The original District filed with the State Board an application for water rights in 1954. AER 2. It assigned that application to the Bureau in 1960 for use in the proposed CVP unit. AER 2, 4/114. The Bureau requested such assignment because the application carried an early priority date and assignment would expedite construction. AER 22. The

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[9] In *Arizona v. California*, 283 U.S. 423, 459 (1931), the Court defined appropriation of water, as follows:

> "To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations."

[10] The basic principles of California prior appropriation law are discussed in point II.E of the Argument.

Bureau promised that a permanent water supply for the District would be made available from the unit pursuant to a reclamation contract. *Id.*

The Bureau subsequently obtained from the State Board the necessary water rights to build the unit. The State Board rendered four decisions which ordered that permits be issued for the "benefit" of the farmers. The farmers were to be the "true owners" of the permanent right to use the water, subject to contract compliance. The right was to be "appurtenant" to land to which water is applied. Decision D-893, 1958 WL 5645 at 34, AER 16/426; Decision D-935, 1959 WL 5685 at 47-50, AER 17/459-61; Decision D-990, 1961 WL 6816 at 36-37, AER 3/97-98; Decision D-1020, 1961 WL 6846 at 10, AER 4/133-34.

The San Luis Unit was authorized by Congress in 1960 as an integral part of the CVP. Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156. Section 1(a) of the 1960 act establishes the principal purpose of the Unit as furnishing irrigation water to the west side of the San Joaquin Valley. It provides that the principal engineering features shall include, among other things, the San Luis Dam and Reservoir, the San Luis Canal, and intradistrict distribution systems.[11] It directs that, in building and operating the Unit, the Bureau shall be governed by federal reclamation law. Section 1(a) also mandates that construction shall not be commenced until the Bureau has secured all rights to the use of water necessary to carry out the Unit's purposes. Section 8 of the 1960 act

[11] The authorizing legislation was discussed in a recent case brought by farmers in the original District against the Bureau challenging its failure to provide drainage service, as required. *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 570, 571, 573-74 (9th Cir. 2000).

requires contracts providing for repayment of the distribution systems.[12]

The original District embraced the majority of the Unit's service area, and several smaller districts occupied the rest. Water for the Unit flows to the Tracy Pumping Plant located in the Delta, is pumped south through the Delta-Mendota Canal, is stored in the San Luis Reservoir, and thereafter resumes its flow through the San Luis Canal and, then, the District's internal distribution system to farmers' lands.[13]

C. The 1963 and Related Contracts

The water users in the original District are beneficiaries of a 1963 water service contract between it and the Bureau pursuant to which the Bureau furnishes water and they bear their share of the costs of constructing and operating and maintaining major supply facilities. JA 27-61. The landowners are beneficiaries of a 1965 repayment contract pursuant to which they repay the costs of the internal distribution system. *Id.* at 62-91. Recordable contracts were also made by the Bureau and most landowners in the late 1960s and early 1970s relating to the sale of their lands in excess of acreage limits. *Id.* at 92-100. All these contracts contain preambles and recitals stating they were made pursuant to federal reclamation statutes. *Id.* at 30, 64, 92. The district

[12] The Unit is described in *Westlands Water District v. United States*, 337 F.3d 1092, 1096 (9th Cir. 2003). President John F. Kennedy attended, and offered remarks at, the ground-breaking ceremony for the San Luis Dam. 337 Remarks in Los Banos, California at the Ground-Breaking Ceremony for the San Luis Dam (August 18, 1962), *in* PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY 1962, 627-29 (". . . [T]he benefits that will come from [this great cause of making water available] are unique and special.")

[13] For maps of the CVP, the Unit, and the District, respectively, *see* www.krisweb.com/hydor/tr311.jpg, www.usbr.gov/mp/sccao/sld/docs/Factsheet2.pdf, and www.usbr.gov/mp/sccao/sld/docs/Drainage%20Need.pdf.

contracts recite they were made under applicable state law. *Id.* at 30, 82.[14]

Two articles of the 1963 contract form the basis of the petitioners' claims for damages in this case. Article 3(d) provides that each year the Bureau "shall furnish" 900,000 acre-feet of water to the District for use on its eligible lands.[15] Article 3(d) provides that the original District "shall . . . pay for" the water under Article 6(a), which provides that the water service component of the rate "may not be in excess" of $7.50 per acre foot.[16]

Several articles of the 1963 contract refer to the water rights of landowners and water users. The first sentence of Article 15 refers to the "right to any water" furnished thereunder possessed by any "tract of land or water user" in the District. The third sentence thereof states payment is a prerequisite to "the right to the use of water" so furnished and no "water user" shall demand water unless he or she has paid the required charges. Articles 23(a), 24(e) and 25(b) impose conditions on excess landowners' "right to receive water made available pursuant to this contract." Finally, Article 3(f) of the 1963 contract provides that the "right to the

[14] Several cases have noted the farmers' status. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 899 F.2d 814, 816, (9th Cir. 1990), *cert. denied, Boston Ranch Co. v. Department of Interior,* 498 U.S. 998 (1990) ("beneficiaries"); *United States v. Westlands Water District*, 134 F.Supp.2d 1111, 1156(E.D. Cal. 2001) ("real parties-in-interest"); *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F.Supp. 715, 731, 732, 746 (E.D. Cal. 1993) ("third-party beneficiaries").

[15] The quantity terms of the 1963 contract were later discussed by the Ninth Circuit in *O'Neill v. United States*, 50 F.3d 677, 680-81 (9th Cir. 1995), *cert denied*, 516 U.S. 1028 (1995).

[16] The price terms were discussed in two cases involving claims by original District farmers against the Bureau. *Barcellos & Wolfsen*, 899 F.2d at 816, 824 n.16;*Westlands*, 134 F.Supp.2d at 1118, 1138-39.

beneficial use of water . . . shall not be disturbed" so long as the District fulfills its obligations.[17]

Several other articles of the 1963 contract refer to third-persons' rights and remedies through or under the District. Article 9(c) relates to water used for irrigation by the District or "those claiming by, through, or under the District." Article 11(b) specifies a remedy for certain claims of the District or "anyone having or claiming to have by, through, or under the District" the right to use the water. Article 11(c) prohibits such remedy in relation to any water actually furnished to and used "by, through, or under" the District.[18]

The 1963 contract also recited lands in the District need additional irrigation water and water to meet such needs can be made available by Bureau works. Articles 1(a) and 12 provide the water is for agricultural use. Article 5 prohibits water being used outside the District.[19]

In July 1963, the original District filed an *in rem* action in state court seeking to validate the 1963 contract. AER 24/490-91. This was done under Article 32 of the contract and applicable statutes. 43 U.S.C. §§ 423e, 511. In December 1963, the court validated the contract as against all persons. It declared the contract and each provision is "valid," "authorized by law," and "binding upon the respective parties thereto." AER 25 at 503-05.

In 1965 the District and the Bureau executed a repayment contract providing for construction, operation, and financing

[17] These articles are discussed in point II.A of the Argument.

[18] These articles are discussed in point II.B of the Argument.

[19] President Kennedy remarked upon the execution of the 1963 contract at the White House. 41 Remarks at the Signing of Water Resources Development Contracts (January 28, 1963), *in* PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY 1963, 104-05 (". . . [t]he largest water service contract in the history of the reclamation program . . . will [make] available [water] to about 350,000 acres . . .").

of the intradistrict distribution system. JA 62-91. It recited the Bureau will furnish CVP water to the District pursuant to the 1963 contract, and the District desires a system to utilize such supply. Article 2(b) provides the system will include facilities to deliver water from the Canal to approximately 400,000 acres of irrigable land. Article 13 parallels Article 15 of the 1963 contract.[20]

During the late 1960s and early 1970s, as construction of Unit works was completed and water became available, excess landowners, including petitioners or their predecessors, signed recordable contracts with the Bureau, as required by reclamation law and Articles 23, 24, and 25 of the 1963 contract. Each was explicitly made "in consideration of the direct and indirect benefits to be derived under the terms" of the 1963 contract, as "implemented" thereby, by all of the lands of the landowner within the District, and as an "inducement" to the Bureau to make water and distribution facilities available to the District for the excess land of the landowners.

Until 1978, the Bureau honored the rights of the pre-merger District and its farmers under the quantity and price terms of the 1963 contract. Farmers in that area bought at least 900,000 acre-feet of water each year and paid no more than $7.50 per acre-feet for such service. As a result, the water rights for the Unit were perfected and preserved under

[20] In 1965, the District and a newer, smaller district on its western border, which had no contract with the Bureau, merged. Cal. Water Code § 37800 *et seq*. Section 37856 of the merger legislation provides that "[l]ands" which were within the District immediately prior to the merger shall have a prior "right with respect to water" to which the District was entitled under any contract with the Bureau over "lands" added to the District as a result of the merger. The right with respect to water of pre-merger lands over merged lands was later discussed in *Sumner Peck Ranch*, 823 F.Supp. at 720-21, 726-27.

state law and the appropriate share of project costs was repaid under federal law.[21]

D. The 1986 Stipulated Judgment

Notwithstanding the above, between 1979 and 1986, the Bureau attempted to reduce water deliveries for fish and wildlife purposes and to raise prices of the remaining water for budgetary purposes. District court litigation ensued among class representatives of pre-merger area lands, class representatives of merged area lands, the District, and the Bureau with respect to such underdeliveries and overcharges.[22]

During the litigation several events occurred which cemented the farmers' right to sue the Bureau for breach of the quantity and price terms of the 1963 contract. First, in 1980 the district court rejected the Bureau's defense of sovereign immunity. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 491 F.Supp. 263, 266-67 (E.D. Cal. 1980).[23] Second, as part of the Reclamation Reform Act of 1982, Congress enacted 43 U.S.C. § 390uu, which gave consent to join the Bureau as a necessary party in any district court suit to adjudicate the contractual rights of a contracting entity and

[21] The initial performance of the Bureau was addressed in *O'Neill*, 50 F.3d at 680-81.

[22] This litigation was later discussed in several cases adjudicating claims by pre-merger area farmers against the Bureau. *O'Neill*, 50 F.3d at 681; *Barcellos & Wolfsen*, 899 F.2d at 817; *Westlands*, 134 F.Supp.2d at 1118-20. A detailed description of the 1979-1986 litigation is contained in the court-approved class notice. AER 26.

[23] The court concluded it would administer rights to the use of water previously adjudicated in the state validation case, citing 43 U.S.C. § 666(a)(2) and *Federal Youth Center v. Jefferson County District Court*, 195 Colo. 55, 59-60, 575 P.2d 395, 398 (1978). It also concluded it would adjudicate in the class action rights to the use of water acquired to operate the Unit, citing 43 U.S.C. § 666(a)(1) and *Dugan v. Rank*, 372 U.S. 609, 617-19 (1963).

the Bureau regarding any contract executed pursuant to federal reclamation law. Pet. App. D.[24] Third, in 1984 the Court of Appeals for the Federal Circuit ruled in *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985), that farmers were "intended" third-party beneficiaries of their irrigation district's reclamation contracts with the Bureau and, thus, were entitled to sue the Bureau for breach.[25]

The litigation was resolved in 1986 by a stipulated judgment, which construed in part and modified in part the 1963 contract, and enforced it as so construed and modified. JA 101-47. Paragraph 2 declares it is to govern the rights and duties of all parties until December 31, 2007. Paragraph 4.1 declares that the 1963 contract is a valid, enforceable and implementable contract, and commands that the Bureau shall perform it. It also declares that the contract entitles the District to water and other service by the Bureau, as specified therein. Paragraphs 4.4, 8, and 9 further awarded the farmers a refund of about $50 million for past overcharges and

[24] The Senate report states the section consents to suit concerning the contractual rights of those who are "parties or beneficiaries" of reclamation contracts. S.REP. NO. 97-373 at 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2570, 2582. In the House, Representative Kazen stated that the "contracting district and the people in it" might have valid arguments which ought to be considered in the appropriate forum, and a committee amendment gives "the irrigation districts and their members" access to the courts. 128 CONG. REC. 8816, 8817 (1982). Representative Clausen stated it allows the "farmers" to sue the Bureau. *Id.* The conference report states the committee's actions should not be prejudicial to "any particular form of remedy" under existing law. Buffalo Bill Dam, Reclamation Reform, and Papago Indian Water Rights, Conference Report, H.R.CONF.REP. NO. 97-855 at 33 (1982).

[25] The Court of Federal Claims has jurisdiction to render judgment upon any claim against the United States founded upon any express or implied contract with the United States. 28 U.S.C. § 1492(a)(1).

declares the future rate to be $7.50 per acre foot, as specified in the 1963 contract.[26]

The 1986 stipulated judgment contains two provisions which directly bear upon the issue presented here. First, Paragraph 4.2 declares: "The District acknowledges that it entered into the 1963 Contract for the benefit of [the pre-merger area] and the lands therein." Second, Paragraph 3 of the stipulated judgment specifies remedies of the parties, including farmers, declaring, in relevant part, as follows:

> ". . . [A]ny other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of . . . any contract or other right or obligation arising independently of this Judgment, notwithstanding that (i) it is required to be performed by this Judgment, . . . or (iii) it is otherwise a subject of this Judgment."[27]

Paragraph 23 declares the stipulated judgment is not a contract "as described in Section 203(a) of the 1982 Act," which is codified at 43 U.S.C. § 390cc(a). The court-approved settlement notice explains the purpose of Paragraph 23 is simply to insure that the stipulated judgment does not inadvertently render the 1982 act applicable to all District lands.[28]

[26] The 1986 stipulated judgment was discussed in several of the subsequent cases involving farmers' claims against the Bureau. *O'Neill*, 50 F.3d at 681; *Barcellos & Wolfsen*, 899 F.2d at 819, 825-26; *Westlands*, 134 F.Supp.2d at 1120-21; *Sumner Peck Ranch*, 823 F.Supp. at 737, 738.

[27] The representatives of pre-merger area farmers stated in the court-approved settlement notice that their rights set forth in the 1963 contract will be set forth in the stipulated judgment and thereby become "directly enforceable." AER 27/528.

[28] The 1982 act gave individual landowners the option to increase acreage limits in exchange for paying higher water rates. *Barcellos & Wolfsen*, 899 F.2d at 817-18; *Westlands*, 134 F.Supp.2d at 1119.

The stipulated judgment was controversial in certain quarters. Congress had required that it rest there for 30 days before becoming effective. Act of Dec. 19, 1985, Pub.L. No. 99-190, § 122, 99 Stat. 1185. It was thereafter approved by Congressional inaction.[29]

In the late 1980s excess land owners sold their lands at pre-project values, as required by the 1963 contract and their recordable contracts, and various new settlers bought those lands. Pet.App. A at 3a. During the late 1980s and early 1990s the price and quantity terms of the 1963 contract, as enforced by the 1986 stipulated judgment, were honored by the Bureau, except as described below. *O'Neill*, 50 F.3d at 681.

E. Subsequent Litigation Between the Farmers and the Bureau

Notwithstanding the 1986 stipulated judgment, future sales of water in the quantity and at the rate agreed and decreed were not to be, and litigation between pre-merger area farmers and the Bureau was not to cease.

Within a year of entry of the stipulated judgment, Congress raised the water rate more than fivefold on farmers owning excess lands under extended recordable contracts. 43 U.S.C. § 390ww(h). Farmers moved in district court to challenge the validity of this new surcharge. Their right to sue the Bureau was not questioned, but their claim was rejected on the merits by the court and, then, on appeal. *Barcellos & Wolfsen*, 899 F.2d at 821-26. A majority of the Ninth Circuit panel concluded the price term of the 1963 contract, as implemented by the recordable contracts, was insufficiently explicit and, therefore, should be construed to allow the exercise of sovereign power. *Id.* at 824-25 n. 18.

[29] *Westlands*, 134 F.Supp.2d at 1120 n.20.

Several suits relating to the failure to provide necessary drainage service were also brought. First, farmers owning excess lands claimed entitlement to the 1963 contract rate for so long as the Bureau failed to provide such service. The district court upheld the farmers' claim. *Westlands*, 134 F.Supp.2d at 1134-44. It rejected the Bureau's sovereign power defenses. *Id.* at 1144-54. It also recognized the right of farmers to sue to recoup the payments made for service not provided. *Id.* at 1154-56.

Second, farmers filed a separate action seeking, among other things, to enforce the Bureau's drainage obligations, including to recover contract damages. The district court initially upheld the farmers' pleadings. *Sumner Peck Ranch*, 823 F.Supp. at 737-49. In particular, the court ruled the farmers had the right to sue the Bureau for damages. *Id.* at 745-47.[30]

Still another lawsuit was a precursor to the underdelivery claim in the case at bar. During the 1993 water year, the Bureau reallocated half of the pre-merger area's water so that, instead of being delivered there, it would pass through the San Francisco Bay and flow to the Pacific Ocean to serve certain fish and wildlife interests. Representatives of farmers sought specific performance of (but not money damages for) the Bureau's water delivery duty under the 1963 contract, as enforced in the 1986 stipulated judgment. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 849 F.Supp. 717, 721-26, 729, 733-34 (E.D.Cal. 1993). The Bureau defended on the ground that it had become impossible to honor the quantity terms of the contract because of subsequent sovereign action.[31] The farmers responded by arguing *inter*

[30] Furthermore, in *Firebaugh*, the Ninth Circuit affirmed in major part the district court's partial judgment compelling the Bureau to perform its statutory drainage obligation. 203 F.3d at 573-74. 577-78.

[31] The Bureau claimed that it reallocated the water pursuant to one or both of two new federal mandates. First, it cited biological opinions of

alia that the statutes on which the Bureau relied were either inoperative or inapplicable or, in the alternative, had not been followed by the government and that the broad mandates in question gave the government discretion to comply with both statute and contract. *Id.* at 724-26, 729, 733-34. The district court abstained from deciding these defenses. *Id.* at 726. However, the court construed certain words of remedial limitation in Article 11(a) of the 1963 contract ("a shortage on account of errors in operation, drought, or any other causes") to include the reallocations, assuming they were later determined to have been mandated by statute. *Id.* at 723-729. The Ninth Circuit affirmed such abstention. *O'Neill*, 50 F.3d at 687-89. It further affirmed that judicial review of such issues would occur, instead, in the case now before this Court. *Id.* at 680, 682. The Ninth Circuit also affirmed the contract interpretation. *Id.* at 682-87.

F. Proceedings Below

In the instant case farmers seek money damages from the Bureau, charging two breaches of the 1963 contract. First, they charge the Bureau reduced the quantity of water it sold by half in 1993 (the reduction involved in *O'Neill*) and by more than half in 1994 in breach of Article 6(d). Second, the Bureau began to assess CVP farmers with "mitigation and restoration payments" under a new statute, as a result of which the farmers' price per acre-foot has been about twice the $7.50 per acre-foot charge specified in Article 6(a).[32]

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federal agencies intended to protect certain salmon and smelt species issued under the Endangered Species Act. 16 U.S.C. § 1536(a)(2). Second, it cited Section 3406(d) of the CVP Improvement Act. Pub. L. No. 102-575, 106 Stat. 4706, 4722 (Oct. 30, 1992). The Bureau argued that the alleged mandates excused it from complying with Article 6(d) of the 1963 contract under the sovereign act doctrine, the unmistakability doctrine, the impossibility doctrine, and Article 11(a) of the 1963 contract. 849 F.Supp. at 721-22, 724-25.

[32] § 3407(c), 106 Stat. at 4726.

The District originally instituted this suit in 1993. The farmers intervened later that year.[33] In 1995 the District moved to dismiss its action "[b]ased on various negotiations and agreements" among it, other districts, the NRDC intervenors, and the Bureau. AER 9/300. The farmers opposed the motion or, alternatively, requested protective conditions. AER 10/314-50. The court granted the District's motion. JA 148-57. Thereafter, the farmers alone prosecuted their contract damage claims.

The main proceedings in the district court consisted of three rounds of cross-motions for partial summary judgment. In 1997 the court denied all motions on the merits. ASER 29/535, 578-79. In 1998 the court rejected the Bureau's argument which claimed, for the first time in 18 years of nearly continuous litigation, that the farmers were not entitled to sue. It held that, because the farmers' lands are "burden[e]d by performance obligations of the water service contract," they were intended third-party beneficiaries. ASER 30/599-603. The court focused exclusively on the farmers' contractual rights, disregarding any property aspects of their water rights. *Id.* at 607-09, 630-31. The court also made two rulings on the merits. First, it narrowly characterized the farmers' underdelivery claim.[34] Second, it dismissed

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[33] The petitioners initially sought equitable relief under a due process theory. *Westlands Water District v. United States Department of Interior*, 850 F.Supp. 1388, 1397-98, 1401, 1408 (E.D. Cal. 1994). The district court initially held the farmers were entitled to pursue their underdelivery claim. *Id.* at 1400, 1401, 1426-27. It granted them leave to amend their overcharge claim. *Id.* at 1408-09, 1426-27.

[34] The court held the Bureau's contractual defense did not give it "carte blanche" to unreasonably or unlawfully deny water to the farmers in derogation of the 1963 contract's intent and purpose. ASER 30/651. It ruled that whether there was sufficient water available to meet "both" contractual requirements and any statutory requirements was a triable issue. *Id.* at 651-52. The court stated that the statutes invoked by the Bureau do not restrict "how" it shall implement them, but provide it with

petitioners' overcharge claim, upholding the Bureau's sovereign act defense. *Id.* at 673-81.[35] As a consequence, the case was poised for trial on the farmers' underdelivery claim and the Bureau's claimed sovereign power defenses.

In 2000 the district court reversed itself and held that the farmers were not entitled to sue. Pet. App. C. The court now ruled that the farmers were incidental, not intended, third-party beneficiaries of the 1963 contract in light of the Ninth Circuit's decision the year before in *Klamath Water Users Protective Assn. v. Patterson*, 204 F.3d 1206, 1210-12 (9th Cir. 1999), *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000), *cert. denied*, 531 U.S. 812 (2000). *Id.* at 29a-34a, 45a. The court stated that the 1963 contract was entered into for the benefit of the lands in the pre-merger area, as acknowledged in Paragraph 4.2 of the stipulated judgment and several subsequent cases. *Id.* at 28a. But it ruled that more was required, an intent to create direct enforcement rights, and that such intent was not apparent. *Id.* at 30a-31a, 33a, 34a. Paragraph 3 of the stipulated judgment, which provides relief may be obtained against the Bureau for violation of the 1963 contract, the court concluded, did not so establish. *Id.* at 37a, 39a-45a. The court noted *Klamath* stated members of the public are assumed to be incidental beneficiaries of their government's contract. *Id.* at 29a.

"discretion" in such regard. *Id.* at 658. It stated that the Bureau would be in breach of any promise which "could have been honored by the reasonable exercise of the discretion afforded by Congress." *Id.* at 658-59. The court noted that the Bureau is insulated from liability only when subsequent general legislation "inadvertently" breaches a federal contract. *Id.* at 657. It also noted that, if Congress enacts legislation "targeted" to abrogate contracts, the Bureau may be sued. *Id.*

[35] *Cf., Westlands*, 134 F.Supp.2d at 1144-54 (claim to recover statutory surcharges as violation of price terms of 1963 contract not barred under either unmistakability or sovereign act doctrines).

The Ninth Circuit in the opinion below affirms. Pet. App. A at 5a-17a. Extending the rationale of *Klamath*, the court holds that the farmers were incidental, not intended, third-party beneficiaries. *Id.* at 11a-16a. That the Bureau and District intended to benefit the farmers, it holds, is not enough. *Id.* at 14a, 15a n.5. It concludes the District is a government and farmers are members of the public and, thus, are presumed to be incidental beneficiaries. *Id.* at 10a, 15a n.5. It finds no explicit intent by the contracting parties to grant farmers enforcement rights. *Id.* at 12a, 14a. The court explicitly declines to follow the Federal Circuit's contrary 1984 decision in *Allen Orchards*. *Id.* at 14a-15a n. 5. The fact farmers originally entered recordable contracts does not alter the court's conclusion. *Id.* at 15a-16a. It also rules the stipulated judgment gives them no right to sue. *Id.* at 16a. In addition, the court rejects any right to sue under 43 U.S.C. § 666(a)(2). *Id.* at 7a-8a n.3. It denies that the farmers may stand in the District's shoes. *Id.* at 16a-17a. And it rules that the Bureau is not precluded by the prior adjudications. *Id.* at 6a.[36]

SUMMARY OF ARGUMENT

The court below has denied petitioners their lawful right to sue to recover the damages they suffered when the Bureau cut off half their water and doubled the price of the rest.

Federal government contracts are construed and enforced like private contracts. *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604, 608-09 (2000); *United States v. Winstar*, 518 U.S. 839, 887 n.32, 895 n.39, (1996) (Souter, J., plurality), 912 (Breyer, J., concurring); *Perry v. United States*, 294 U.S. 330, 352 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

[36] The Ninth Circuit also vacates as nullities the district court's earlier merits rulings. Pet. App. A at 17a-20a.

Where a non-party sues as an intended third-party beneficiary, he or she must show only that the contract was intended for his or her direct benefit. *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912); *Hendrick v. Lindsay*, 93 U.S. 143, 147 (1876). Intended beneficiary status exists where the contract plainly states it is to be performed for a third-party's benefit. *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 428 (1959). Intended third-party beneficiary status may also be implied from the language of the contract, or its surrounding circumstances. *Hendrick*, 93 U.S. at 147.

In the case at bar, intended beneficiary status is powerfully implied by the language of the 1963 contract and integrated contracts and incorporated statutes. That implication is strongly confirmed by surrounding circumstances. And, in the 1986 stipulated judgment, the parties made explicit that the farmers had been intended to benefit from performance of the 1963 contract and to possess the right to enforce it.

Several articles of the 1963 contract refer to the farmers' right to use the water sold thereunder, and one specifically provides that such right shall not be disturbed. This implies the parties mutually intended to confer on farmers the direct benefit of the Bureau's performance. This, alone, establishes intended beneficiary status under the *German Alliance* test.

Several other articles of the 1963 contract refer to the right to use water, or the remedy for not receiving it, of anyone claiming such right or remedy through or under the District. Those who claim a right or remedy through or under the District include, at the very least, its landowners and water users. These articles strongly imply the parties intended to allow the farmers to sue.

The 1963 and 1965 contracts provide that the water users pay per acre-foot charges and landowners pay per acre assessments. Other contracts are integrated with the 1963

contract, including recordable contracts between the Bureau and excess landowners. Each was made in consideration of the benefits derived under the 1963 contract, and as an inducement to the Bureau to furnish the water for such lands. Accordingly, the farmers provide to the Bureau the consideration for the water.

Each contract was explicitly made pursuant to federal reclamation law, including Section 8 of the 1902 act. As construed in four leading decisions of this Court, such law makes unmistakably clear that the farmers who apply the water to their lands perfect and preserve, and equitably own, property rights in the water which are appurtenant to their lands. *Nevada v. United States*, 463 U.S. 110, 121-28 (1983); *California,* 438 U.S. at 664, 653, 665, 667; *Nebraska v. Wyoming*, 325 U.S. 589, 611-16 (1945); *Ickes v. Fox*, 300 U.S. 82, 93-96 (1937). Furthermore, the Bureau is required to recoup project costs. Finally, districts are conduits for water in one direction and money in the other, and were required for administrative convenience.

The contracts between the Bureau and the District also explicitly provide they were made under the law of California. Under such law, water rights possess certain well-established characteristics, including appurtenancy to the land. Furthermore, districts are obligated to distribute to farmers water furnished by the Bureau.

The contract language implying intended beneficiary status is confirmed by surrounding circumstances. The farmers equitably own the water rights which were perfected and are preserved by their use of the very water sold and delivered under the 1963 contract. They do not simply enjoy an indirect economic benefit as a result of its use. They hold a property right in its usage which is appurtenant to their lands.

A water district is a surrogate created by farmers to deal with the Bureau. A district uses no water and has no source

of income except the water charges and land assessments it collects from farmers. A water district is a government only in a nominal sense, as its functions and purposes are limited to water distribution to, and money collection from, its farmers.

If there was ever any doubt as to whether the contract language and surrounding circumstances implied intended beneficiary status—and petitioners contend there was none—the 1986 stipulated judgment definitively removed such doubt. Indeed, it expressly confers such status on farmers. Paragraph 4.2 provides: "The District acknowledges that it entered into the 1963 contract for the benefit of [the pre-merger area] and the lands therein." Furthermore, Paragraph 3 provides that "any other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of . . . any contract or other right or obligation arising independently of this Judgment . . . ." Thus, the parties made explicit in 1986 what had been implicit for over 20 years.

Finally, in the 1979-1986 litigation and in the subsequent cases between the farmers and the Bureau, the Bureau either lost challenges to the farmers' right to sue, or raised no such challenges. Accordingly, the Bureau is precluded from questioning such right at this late date.

ARGUMENT

I. THE FARMERS ARE INTENDED BENEFICIARIES, BECAUSE INTENT TO CREATE SUCH STATUS IS IMPLIED IN THE LANGUAGE OF THE CONTRACT AND THE SURROUNDING CIRCUMSTANCES AND IS EXPRESSED IN THE STIPULATED JUDGMENT

The government's power to make binding contracts is an important element of sovereignty. *Winstar*, 518 U.S. at 884 n.28, 894 n.38 (Souter, J., plurality); *Perry*, 294 U.S. at 353.

The government may not simply repudiate its contractual obligations. *Winstar*, 518 U.S. at 903 n.51 (Souter, J, plurality), 912 (Breyer, J., concurring), 924 (Scalia, J., concurring); *Perry*, 294 U.S. at 351; *Lynch*, 292 U.S. at 580. If it is allowed to breach its contracts without providing relief to the persons injured, its credibility will be undermined and its capacity to make contracts will be compromised. *Winstar*, 518 U.S. at 883-86 (Souter, J., plurality); *Lynch*, 292 U.S. at 580. It may not shift the burdens of subsequent political action to its contractors where those burdens should properly be borne by the public as a whole. *Winstar*, 518 U.S. at 883, 896-97 (Souter, J., plurality). Finally, for every wrong there should be a remedy. *Marbury v. Madison*, 5 U.S. 137, 162-63 (1803).

Federal common law governs the validity and construction of a contract obligation of the government. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 519 (1988). In particular, the federal common law applies to reclamation contracts made with water districts by the Bureau. *Ivanhoe*, 357 U.S. at 289. When the government makes a contract, its rights and duties are governed generally by the law applicable to private contracts. *Mobil Oil*, 530 U.S. at 607; *Winstar*, 518 U.S. at 887 n.32, 895 n.39 (Souter, J., plurality), 912 (Breyer, J., concurring); *Perry*, 294 U.S. at 352; *Lynch*, 292 U.S. at 579.

A federal government contract is construed in terms of the parties' intent, as revealed by language and circumstance. *Winstar*, 518 U.S. at 911 (Breyer, J., concurring); *Perry*, 294 U.S. at 348-49. The terms are to be found in part in the statutes under which they are made. *Mobil Oil*, 530 U.S. at 609; *Lynch*, 292 U.S. at 577. They are also found in related agreements to which the contract refers. *Winstar*, 518 U.S. at 861-68 (Souter, J., plurality).

This Court has upheld contractual claims by intended third-party beneficiaries. *Crumady*, 358 U.S. at 428; *Hendrick*, 93 U.S. at 149. The proper test is whether the parties to the

contract intended it to be for the third-party's direct benefit, so as to entitle him or her to sue. *German Alliance*, 226 U.S. at 230; *Hendrick*, 93 U.S. at 147. The principles of federal common law apply to such claims against a federal agency. *Audio Odyssey, Ltd. v. United States*, 255 F.3d 512, 520 (8th Cir. 2001); *Holbrook v. Pitt*, 643 F.2d 1261, 1270 n.16 (7th Cir. 1981).[37]

Where a contract explicitly states the benefit of performance is in the third-party, intended status is established. *Crumady*, 358 U.S. at 428; *Woolard v. JLG Industries, Inc.*, 210 F.3d 1158, 1168-70 (10th Cir. 2000); *Avco Delta Corp. v. United States*, 484 F.2d 692, 701-03 (7th Cir. 1973), *cert. denied*, *Canadian Parkhill Pipe Stringing Ltd. v. United States*, 415 U.S. 931 (1974). A non-party to a federal contract may also sue the government where the parties impliedly intended performance of the contract to benefit him or her. *E.g., Carlow,* 40 Fed.Cl. at 781; *Schuerman*, 30 Fed.Cl. at 433.

The language employed in the contract is one element to be considered in determining the intentions of the parties. *Hendrick,* 93 U.S. at 147. But it should be considered in connection with the subject matter of the contract, the situation of the parties, the thing to be done, and the surrounding circumstances. *Id.* In particular, such intent may be implied where the beneficiary was reasonable in relying on

[37] Federal courts allow persons who were not signatories to a federal contract to sue the federal government as an intended beneficiary thereof. *E.g., Airplane Sales International Corp. v. United States*, 54 Fed.Cl. 418, 421 (2002); *Guardsman Elevator Co. v. United States*, 50 Fed.Cl. 577, 582-84 (2001); *Carlow v. United States*, 40 Fed.Cl. 773, 779-83 (1998); *Schuerman v. United States*, 30 Fed.Cl. 420, 427-34 (1994); *Busby School of Northern Cheyenne Tribe v. United States*, 8 Cl.Ct. 596, 601-02 (1985).

the promise. *E.g., Carlow*, 40 Fed.Cl. at 781; *Schuerman*, 30 Fed.Cl. at 431.[38]

Two cases have held that farmers may sue a federal water agency for breach of its contract with their water district. *Allen Orchards*, 749 F.2d at 1576; *Henderson County Drainage District No. 3 v. United States*, 53 Fed.Cl. 48, 50-52 (2002), *reconsideration denied*, 55 Fed.Cl. 334 (2003). Both found that surrounding circumstances implied the district and the government intended performance to benefit the farmers.

The facts of *Allen Orchards* were that in 1905 the Bureau constructed the Yakima Project in eastern Washington. It initially contracted directly with farmers to provide them with water. After the 1926 amendments to the reclamation act, farmers established under Washington law ten irrigation districts, and each district made a repayment contract with the Bureau. In 1937 this Court analyzed the water rights of the farmers in the *Ickes* case. 300 U.S. at 95-96. In 1943 the Court of Appeals for the D.C. Circuit affirmed that the water rights were property of the farmers, water was to be distributed under state law priorities, the quantity was to be determined by use, and use is reasonable where water is diverted and applied using methods customary in the locale. *Fox v. Ickes*, 137 F.2d 30, 33, 35 n.9 (D.C. Cir. 1943), *cert.*

[38] The normal principles of third-party beneficiary law have been restated. A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty. *Restatement (Second) of Contracts* § 304. Promises to render performance require a manifestation of intention to give the benefit of the performance to the beneficiary. *Id.* at Comment c. A beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *Id.* at § 302(1)(b). If the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary. *Id.* at Comment d.

denied, 320 U.S. 792 (1943). In 1945 still further litigation seeking to determine the specific water rights of project farmers was resolved by consent decree. Under that decree, senior water rights were not proratable, whereas junior water rights were proratable, in the event of shortage. Thereafter, the districts and the Bureau made new or amended reclamation contracts which incorporated the consent decree. In 1977, a drought year, the Bureau initially projected that the junior right holders would be able to buy only a small portion of the water to which they were otherwise entitled. They responded by fallowing much of their land. A wet spring, however, ultimately resulted in deliveries aggregating 70% of normal. About 160 out of many thousands of junior right holders, who had been unable to persuade any of their districts to sue the Bureau, sued it themselves, claiming that the initial estimate violated an implied promise in their districts' contracts. The claims court ruled, among other things, that the farmers could not sue the Bureau directly. *H.F. Allen Orchards v. United States*, 4 Cl.Ct. 601, 607-13 (1984). However, the Federal Circuit reversed on this point only, holding as follows:

> "[W]e disagree with the Claims Court's determination that appellants were not correct parties to sue under the consent decree and subsequent alleged implied contracts. It is undisputed that appellants have a property right in the water to the extent of their beneficial use thereof. *Fox v. Ickes*, *supra*. The irrigation districts, which contracted with the Bureau, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the government supplies. It is clear that the appellants, owners of the property at issue, the water, also are intended third-party beneficiaries of the 1945 Consent Decree. Under the rules of the Claims Court 'every action shall be prosecuted in the name of the real party in interest.' Claims Court R. 17(a). Here the farmers, owners of the water and beneficiaries of the irrigation projects, are the true parties in interest." *Allen Orchards*, 749 F.2d at 1576.

Henderson is similar as to facts, reasoning, and outcome. In 1913 farmers created a district to protect their farmland by constructing and operating drains and levees. In the 1930s the United States Army Corps of Engineers constructed and thereafter operated a related navigation channel. In 1961 the district made a contract with the Corps to settle claims arising from the Corps' operation of its project. More than three decades after the contract was made, farmers within the district sued the Corps to enforce it. The Court of Federal Claims held that the farmers were entitled to sue, finding that they would be reasonable in relying on the promises made by the Corps to the district in the contract as manifesting an intent to create such a right. 53 Fed.Cl. at 52.

Here, the 1963 contract implied that the parties intended that the farmers would directly benefit from performance and, thus, be entitled to sue. *German Alliance*, 226 U.S. at 230. Such intention was implied in the language of the contract and, as in *Allen Orchards* and *Henderson*, in the surrounding circumstances. Later, such intention to benefit and the resulting right to sue were made explicit in the stipulated judgment.

II. THE CONTRACTUAL LANGUAGE IMPLIES THAT THE FARMERS ARE INTENDED BENEFICIARIES

In upholding the right of an intended third-party beneficiary to sue for breach of a contract to which he was not a party, this Court held: "In construing letters like those on which this suit is based, the language employed is one . . . element to be considered in arriving at the intention of the writers." *Hendrick*, 93 U.S. at 147. Under ordinary principles of contract law, the Court construes a federal contract in terms of the parties' intent, as revealed by "language"

and circumstance. *Winstar*, 518 U.S. at 911 (Breyer, J., concurring).

The court below does not correctly analyze the language of the 1963 contract. It construes Articles 11(b) and 15 unduly restrictively. It ignores other recitals and articles of the contract, and fails to take account of other integrated contracts. It disregards the federal statutes incorporated therein. It also disregards incorporated state water law. Due account of the contract and related language compels the conclusion the farmers are intended beneficiaries.

A. Certain Articles of the 1963 Contract Imply That the Farmers Were Intended to Benefit From its Performance

The Ninth Circuit's reading of Article 15 of the 1963 contract is unduly restrictive. The first sentence of Article 15 refers to the "right to any water" furnished thereunder possessed by any "tract of land or water user" in the District. JA 45. The court concludes this sentence does not establish that farmers possess enforceable rights "against the government." Pet. App. A at 12a. Similarly, the third sentence of Article 15 states that payment is a prerequisite to "the right to the use of water" and no "water user" shall demand water unless the required charges have been paid. *Id.* at 11a-12a. The court acknowledges this defines in part the farmers' rights to water as provided by the District. *Id.* at 13a. But such rights, it again concludes, "are against Westlands, not the government." *Id.* at 12a.[39]

This strained interpretation is wrong for two reasons. First, its premise is incorrect. An appropriative right to use water,

[39] The court does not address other articles referring to landowners' and water users' right to receive water made available under the contract, including Articles 23(a), 24(e), and 25(b). Nor does it discuss Article 3(f) which provides that the "right to the beneficial use of water . . . shall not be disturbed."

subject to prior rights, is a right "as against all the world." *Utt v. Frey*, 106 Cal. 392, 396, 39 P. 807, 808 (1895). Here, the state water rights permits issued to the Bureau in the late 1950s and early 1960s make clear farmers are the true owners of the water rights and the rights are appurtenant to their lands. Decision D-935, 1959 WL 5685 at 47-50, AER 17/459-61; Decision D-990, 1961 WL 6816 at 36-37, AER 3/97-08.

Second, even if the farmers had no property right, where, as here, the District is a promisee under a contract and the Bureau is the promisor, a farmer is also protected against the Bureau under third-party beneficiary law. *Restatement (Second) of Contracts* §§ 302(1)(b), 304, Comment c. The Ninth Circuit correctly acknowledges the farmers have a right to obtain water against the District. Pet.App. A at 12a-13a. As this Court stated in *Bryant v. Yellen*, 447 U.S. 352, 371 (1980), *reh'g denied*, 448 U.S. 911 (1980): "Nor has it been suggested that the District . . . could have rightfully denied water to individual farmers. . . . Indeed, as a matter of state law . . . the [District's water] right was equitably owned by the beneficiaries to whom the District was obligated to deliver water." The Court further noted the landowners "have a legally enforceable right, appurtenant to their lands, for continued service by the District." *Id.* at 371 n.23.[40]

Thus, Article 15 and similar provisions, which recognize farmers' rights to use the water, strongly imply that the parties to the contract intended that performance would benefit the farmers. This implication is sufficient to establish intended beneficiary status under the *German Alliance* test.

[40] For this proposition the court cited *Erwin v. Gage Canal Co.*, 226 Cal.App.2d 189,194-95, 37 Cal.Rptr. 901, 903-05 (1964) and *South Pasadena v. Pasadena Canal & Water Co.*, 152 Cal. 579, 588, 93 P. 490, 494 (1908).

B. Certain Articles of the 1963 Contract Imply That the Farmers Were Intended to Have Enforcement Rights

Article 9(c) of the 1963 contract provides the Bureau lacks certain rights with respect to water being used for irrigation by the District or "those" claiming by, "through, or under" the District. Article 11(b) provides a remedy for certain types of shortage, and such remedy is available to the District or "anyone" having or claiming to have by, "through, or under" the District the right to use the water. Article 11(c) renders that limited remedy unavailable in relation to any water actually furnished to and used by, "through, or under' the District. JA 40-41, 43, 44. Discussing Article 11(b), but not the other two provisions, the Ninth Circuit holds the contract does not evidence a farmer's right to sue, as follows:

> "Because only Westlands under the 1963 contract has direct contractual privity with the government and is obligated to pay it money, the contested language of Article 11(b) can only sensibly refer to individuals or entities to whom Westlands has contractually *assigned* its rights and duties under the 1963 contract and who are now in contractual privity with the government. It cannot establish the inconsistent proposition that these same individuals or entities are intended third party beneficiaries of the contract." (Emphasis in original) Pet. App. A at 13a-14a.

This interpretation is unduly strained on two counts. First, invoking the classical contract notion of "privity" begs the question, as the intended third-party beneficiary rule is, by definition, an "exception" thereto. *German Alliance*, 226 U.S. at 230; *Second National Bank v. Grand Lodge*, 98 U.S. 123, 124 (1878).

Second, while Article 31(a) of the 1963 contract states that "no assignment or transfer of this contract or any part thereof or interest therein shall be valid until and unless approved by

the United States," JA 55, there is no doubt that if the District were to assign the contract to another party, the latter would succeed to the District's rights and duties thereunder. But, both parties also knew—and intended—that the farmers, with or without any such assignment, would pay for and use the water. That assignees may sue does not preclude suits by farmers. It taxes credulity to suppose that, when the parties referred to "those" or "anyone" having or claiming rights "through, or under" the District, they intended to recognize rights or remedies exclusively of some possible future assignee, and not also those known and existing persons who would use and pay for the water.

Article 11(b) and similar provisions, which recognize third persons have rights and remedies through or under the District, strongly imply the farmers were, or were among, those persons.[41]

C. Other Provisions of the 1963 Contract and Other Integrated Contracts Imply That the Farmers are Intended Beneficiaries

The Ninth Circuit limits its discussion of the language to Articles 11(b) and 15 of the 1963 contract. Yet other recitals and articles thereof and other contracts integrated therewith also imply that the District and the Bureau intended the contract was to benefit the farmers and, thus, entitle them to sue.

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[41] This is not the first time the Ninth Circuit has interpreted the 1963 contract in favor of the Bureau. *E.g., O'Neill*, 50 F.3d at 683-85; *Peterson v. United States Department of the Interior*, 899 F.2d 799, 808-12 (9th Cir. 1990), *cert. denied*, 498 U.S. 1003 (1990); *Barcellos & Wolfsen*, 899 F.2d at 824-25. Each such decision emphasized the unmistakability doctrine. *O'Neill*, 50 F.3d at 686; *Peterson*, 899 F.2d at 812; *Barcellos & Wolfsen*, 899 F.2d at 824-25 n.18. Each was also decided prior to this Court's *Winstar* decision.

The recitals and Articles 1(a), 5, and 12 of the 1963 contract manifest the existential facts underlying the program administered by the Bureau and the function of the District. JA 30-32, 37, 44. The water was developed and is sold so that the farmers in the District can irrigate their crops.

The 1965 contract recites that the Bureau will furnish CVP water to the District pursuant to the 1963 contract, and that the District desires the Bureau to construct the distribution system in order to utilize that supply. Article 2(b) requires construction of facilities for delivery of water from the Bureau's supply works to approximately 400,000 acres of irrigable land. JA 64, 66.

Furthermore, each excess landowner in the District entered a recordable contract with the Bureau. Each provides it was made in "consideration of the direct and indirect benefits" to be derived under the terms of the 1963 contract by all his or her lands. Each provides it was made by the landowner "as an inducement to the United States to make water and distribution facilities available to the District for the excess land of the landowner." JA 92, 93.

These related contracts further confirm that the Bureau and the District intended that the farmers enjoyed the benefits and bore the burdens of the 1963 contract.

D. Federal Reclamation Statutes Incorporated in the Contracts Imply That Farmers are Intended Beneficiaries

The preamble of the 1963 contract states it was made "in pursuance generally" of the 1902 act and acts amendatory thereof or supplementary thereto. JA 30. It also recites the District desires to contract "pursuant to the Federal reclamation laws." JA 31. The preambles of the 1965 contract and all recordable contracts are to similar effect. JA 64-65, 92.

A government contract in effect incorporates the statutes under which it was made. *Mobil Oil*, 530 U.S. at 609 (statutes to which contracts were subject "in effect were incorporated" therein); *Lynch*, 292 U.S. at 577 (terms of contracts were found "in part in the statutes under which they are issued").[42]

In 1902 Congress enacted in Section 8 the basic property rights principles governing a reclamation project. The Bureau shall proceed in conformity with the state law of prior appropriation and honor vested rights acquired thereunder. 43 U.S.C. § 383. The water right is appurtenant to the land irrigated, and beneficial use is the basis and measure of the right to the use of the water. *Id.* at § 372.

The 1937 act authorizing the CVP provides that the Bureau may acquire all water rights necessary for project purposes. 50 Stat. 844. Section 1(a) of the 1960 act authorizing the Unit states that its construction shall not be commenced until the Bureau has secured all rights to the use of water which are necessary to carry out its purposes. 74 Stat. 156

The reclamation law also requires the Bureau to secure repayment of construction and operation and maintenance costs by land assessments or water charges. 43 U.S.C. §§ 423e, 485h.

Finally, in 1922 Congress authorized the Bureau to contract with districts, as well as farmers. 43 U.S.C. § 511. An irrigation district was resorted to by the Bureau and farmers "for convenience" in the distribution of water and the collection of charges. *Nampa & Meridian Irrigation District v. Bond*, 283 F. 569, 570 (D.Id. 1922), *aff'd*, 288 F. 541 (9th

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[42] Cases finding intended beneficiary status against a federal agency often rely on the statutes and regulations authorizing the contracts. *E.g.*, *Audio Odyssey*, 255 F.3d at 521-22; *Carlow*, 40 Fed.Cl. at 781-83; *Schuerman*, 30 Fed.Cl. at 433; *Busby School*, 8 Cl.Ct. at 602; *Holbrook*, 643 F.2d at 1271 n.18.

Cir. 1923), *aff'd*, 268 U.S. 50 (1925). In 1926 Congress directed the Bureau to contract with districts on new projects. 43 U.S.C. § 423e. The overall purpose of the 1926 legislation was the rehabilitation of projects and the insuring of their future success. 43 U.S.C. § 423f. It was "to provide relief to settlers," not "to change the policy of reclamation law." *Yellen v. Hickel*, 335 F.Supp. 200, 204 (S.D. Cal. 1971), *rev'd on other grounds*, 559 F.2d 509 (9th Cir. 1977), *on reh'g*, 595 F.2d 524 (9th Cir. 1979), *rev'd and vacated in part sub nom., Bryant*, 447 U.S. 352. The formation of such districts is "merely for administrative expediency." *Yellen v. Hickel*, 352 F.Supp. 1300, 1306 (S.D. Cal. 1972), *rev'd on other grounds*, 559 F.2d 509, *on reh'g*, 595 F.2d 524, *rev'd and vacated in part sub nom., Bryant*, 447 U.S. 352. One court has described an irrigation district's interest in a federal project as a contractual right to manage facilities. *Truckee-Carson Irrigation District v. Secretary of Interior*, 742 F.2d 527, 530-31 (9th Cir. 1984), *cert. denied*, 472 U.S. 1007 (1985).

Consideration of these federal reclamation statutes confirms that the Bureau and District intended that farmers were to benefit from performance of the 1963 contract and, accordingly, may sue to enforce its terms.

E. State Law Incorporated in the Contracts Implies That Farmers are Intended Beneficiaries

The 1963 contract also recited the District desired to contract pursuant to "the laws of the State of California." JA 31. Under Article 22 of the 1965 contract, the Bureau reserves the right to make regulations which are "consistent with . . . the laws of . . . the State of California." JA 82. The California law of prior appropriation and water district law further demonstrate the farmers were intended beneficiaries.

Appropriative water rights are private property rights to divert a specified quantity of water for actual beneficial uses. *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 23-26, 276 P. 1017, 1025-26 (1929). Appropriative water rights are real property and appurtenant to the lands watered. *Wright v. Best*, 19 Cal.2d 368, 378-79, 121 P.2d 702, 709 (1942); *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 724, 93 P. 858, 861-62 (1908). A thing is "appurtenant to land when it is by right used with the land for its benefit. . . ." Cal. Civil Code § 662. Such rights are usufructuary in nature. *State v. Superior Court of Riverside County*, 78 Cal.App.4th 1019, 1025, 93 Cal.Rptr.2d 276, 281 (2000). Any person who wishes to appropriate water must apply for a permit from the State Water Resources Control Board. Cal. Water Code §§ 1201, 1250. The State Board issues a permit if unappropriated water is available and the proposed use is beneficial. *Id.* at §§ 1240, 1255, 1375. An appropriative water right gives the appropriator the right to take and use the water, is inchoate until perfected, and vests at the time the water is actually diverted and beneficially used. *Id.* at §§ 1225, 1381, 1450, 1455, 1610; *Yuba River Power Co. v. Nevada Irrigation District*, 207 Cal. 521, 526-28, 279 P. 128, 130-31 (1929). A water right is measured by, and limited to, "such water as shall be reasonably required for the beneficial use to be served . . ." Cal. Water Code §100. An appropriator is entitled to make a reasonable use of the water according to "the general custom of the locality," so long as it does not involve unnecessary waste. *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 Cal.2d 489, 546-47, 45 P.2d 972, 997 (1935); *Barrows v. Fox*, 98 Cal. 63, 64, 32 P. 811, 811-12 (1893). When a person entitled to use water fails to use any part of it for a period of five years, such unused water may revert to the public and be regarded as unappropriated water. Cal. Water Code § 1241; *Erickson v. Queen Valley Ranch Co.*, 22 Cal.App.3d 578, 582, 99 Cal.Rptr. 446, 448 (1971). Finally: "As between appro-

priators, the one first in time is the first in right." Cal. Civil Code § 1414. "[W]ater right priority has long been the central principle in California water law." *Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1242, 5 P.3d 853, 864 (2000).

California water districts are authorized to contract with the Bureau for irrigation water. Cal. Water Code §§ 35875 *et seq*. The right to use water shall be furnished in accord with the reclamation law and contracts. *Id*. at § 23200.

The incorporation of California law in the contracts reflects an intention of the parties to recognize farmers' rights. They equitably own the water right under the law of prior appropriation, and it is appurtenant to their lands. The District enters and performs contracts with the Bureau for their benefit. These principles imply the parties intended that farmers were to benefit from the contract and, thus, would be able to sue the Bureau to recover damages.

III. THE SURROUNDING CIRCUMSTANCES IMPLY THAT THE FARMERS ARE INTENDED BENEFICIARIES

In upholding the right of an intended third-party beneficiary to sue for breach of a contract to which he was not a party, this Court held: "In determining the sense in which the words were used, they should be considered in connection with the subject-matter of the correspondence, the situation of the parties, the thing to be done, and the surrounding circumstances." *Hendrick*, 93 U.S. at 147. Under ordinary principles of contract law, the Court construes a federal contract in terms of the parties' intent, as revealed by language and "circumstance." *Winstar*, 518 U.S. at 911 (Breyer, J., concurring).[43]

[43] Federal judges finding intended beneficiary status often rely on "circumstances." *Airplane Sales,* 54 Fed.Cl. at 421 (citing *Restatement (Second) of Contracts* § 304(1)(b)); *Carlow,* 40 Fed.Cl. at 780 (same); *Schuerman*, 30 Fed.Cl. at 431 (same).

Four circumstances confirm the conclusion that the farmers have at all times since 1963 been intended third-party beneficiaries of the 1963 contract—the property rights the farmers hold, the consideration they pay, their reasonable reliance on the implied intention of the parties, and the nature and limited function of the District.

A. The Farmers Are Intended Beneficiaries, Because They Perfected, Own, Use, and Preserve the Water Rights

In *Allen Orchards* the Federal Circuit focused on the nature of the property rights held by the farmers. It stated the farmers "have a property right in the water to the extent of their beneficial use thereof." 749 F.2d at 1576. It further stated the farmers were "owners of the property at issue, the water." *Id*. The court cited *Fox*, 137 F.2d at 33, 35 n.9. *Id*. The *Fox* court, in turn, followed this Court's decision in *Ickes*, 300 U.S. at 93-96. 137 F.2d at 33, 35.

In *Ickes* the Court held that, in a suit by farmers against the Bureau, the United States was not an indispensable party. 300 U.S. at 96-97. In so ruling, the Court noted that the farmers relied upon the appurtency and beneficial use principles of Section 8, 43 U.S.C. § 372, and of Washington law. *Id* at 93 n.2, 93-94 n.3. It stated the action challenged would deprive farmers of "vested property rights" acquired under both such laws. *Id*. at 96-97. In rejecting the Bureau's contention that ownership of the water or water rights was vested, instead, in the United States, the Court held:

> "Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the

property right of the government in the irrigation works. Compare *Murphy v. Kerr* (D.C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (Id.), with the right to receive the sums stipulated in the contracts as reimbursement for costs of construction and annual charges for operation and maintenance of works." *Id.* at 95.

The Court further ruled:

> "And in [western] states, generally, including the state of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied." *Id.* at 95-96.

In *Nebraska*, this Court followed *Ickes* and rejected a claim of the government, which had intervened in an interstate water dispute. 325 U.S. at 611-16. The Court relied, again, on the appurtency and beneficial use principles, as well as the principles requiring the Bureau to conform to state law and honor farmers' water rights. *Id.* at 612-13. The Court held:

> "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. [Citation]." *Id.* at 614.

It stated that: ". . . [I]ndividual landowners have become the appropriators of the water rights, the United States being the storer and the carrier." *Id.* at 614-15. It concluded: "We are dealing here only with an allocation, through the States, of water rights among appropriators. . . . [T]he water rights of

the landowners [are recognized]. To allocate those water rights to the United States would be to disregard the rights of the landowners." *Id.* at 615-16.

As the Court stated in *California*, a case construing Section 8 as applied to the CVP, "the Act clearly provided that state water law would control in the appropriation and later distribution of the water." 438 U.S. at 664. First, the Bureau must "appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *Id.* at 665. Second, the "distribution" of water released from the federal supply facilities "to individual landowners would again be controlled by state law." *Id.* at 667. Through the history of the relationship between federal and state governments runs "the consistent thread of purposeful and continual deference to state water law by Congress." *Id.* at 653.

Finally, in *Nevada*, this Court unanimously ruled that a 1944 stipulated judgment adjudicating the water rights in a federal reclamation project was binding on the government, the farmers, and their water district and that the government was precluded from reallocating to non-irrigation uses the water governed thereby. 463 U.S. at 128-45. As a prelude to so ruling, the Court reiterated the teaching of *Ickes*, *Nebraska*, and *California*. *Id.* at 121-28. The government's attempt to reallocate water from irrigation uses, as agreed and decreed, to other uses, said the Court, "would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West." *Id.* at 121. The Court stated:

> "The law of Nevada, in common with most other western States, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land.

> [Citation] Such a right is appurtenant to the land on which it is used. [Citation]." *Id.* at 126.[44]

It further stated: "[T]he beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." *Id.*[45] The Court concluded:

> "[T]he Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." *Id.*[46]

That the farmers equitably own the right to beneficially use the water and it is appurtenant to their lands powerfully implies, as it did in *Allen Orchards*, intended beneficiary status. Where one person, pursuant to a contract with a carrier, delivers private property owned by a third person, the latter is an intended beneficiary of the contract.[47] Where

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[44] Under the appurtenancy rule of federal reclamation and state appropriation law, water rights under the decree attach to specific parcels to which water has been beneficially applied. *United States v. Alpine Land & Reservoir Co.*, 340 F.3d 903, 919 (9th Cir. 2003); *United States v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1075 n.18 (9th Cir. 2002).

[45] The government's ownership of the water rights, stated the Court, was "at most nominal." *Id.* The government had "mere title." *Id.*

[46] The Solicitor of the Department of the Interior followed the Court's rulings in the late 1980s and early 1990s. *E.g.*, 100 Interior Dec. 185, 193, 1992 WL 676597 (D.O.I.); 97 Interior Dec. 21, 25-27, 1989 WL 506913 (D.O.I.).

[47] *E.g., Downey v. Federal Express Corp.*, 1993 WL 463283 (N.D. Cal. 1993) (photographer is intended beneficiary of contract between developer and shipper to return transparencies); *Allred v. Bekins Wide World Van Services*, 45 Cal.App.3d 984, 989, 120 Cal.Rptr. 312, 314-315 (1975) (employee is intended beneficiary of contract between employer and shipper to return furniture).

property is injured for lack of water, the owner may sue the water supplier for breach of its promise to the city if the contract was made for the direct benefit of such owners.[48]

The farmers here enjoy far more than mere indirect economic benefit to their lands. They have an admitted right to water against the District, the promisee.[49] Thus, the Bureau, the promisor, may be sued. *Restatement (Second) of Contracts* §§ 302(1)(b), 304, Comment c. They own an equitable property right in the water sold by the Bureau to the District—the very water which is the subject matter of the contract. That right is appurtenant to their lands.

These circumstances, alone, imply with great force that the parties to the contract intended directly to benefit the farmers by its performance and, as a consequence, to allow them to sue for damages for underdeliveries.

B. The Farmers are Intended Beneficiaries, Because They Pay for the Water

The Federal Circuit in *Allen Orchards* also emphasized this circumstance: "The farmers ultimately pay for all the services which the government supplies." 749 F.2d at 1576.

The Ninth Circuit below acknowledges this circumstance. Pet. App. A at 11a-12a. But the court gives it no legal weight. *Id.* at 14a-15a n.5.

Where a producer of goods contracts to sell them to an intermediary with knowledge the intermediary will resell

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[48] *E.g., Harris v. Board of Water and Sewer Commissioners*, 294 Ala. 606, 611, 320 So.2d 624, 628 (1975) ("[T]he most direct benefit inures to the people of the City . . . who rely on these city-provided services for the protection of their property"); *Woodbury v. Tampa Waterworks Co.*, 57 Fla. 249, 253-54, 49 So. 556, 561 (1909) ("[T]he contract was intended to be for the direct and substantial benefit of the city and of its individual property holders and inhabitants").

[49] *Bryant*, 447 U.S. at 371 n.23.

them to certain buyers, the latter may sue the producer as intended beneficiaries. *E.g.*, *Reigel Fiber Corp. v. Anderson Gin Co.*, 512 F.2d 784, 787-88 (5th Cir. 1975) (cotton growers knew that ginners were buying cotton as accommodation and that merchants were ultimate buyers).

The same is true where the government is the seller. For instance, in *Airplane Sales*, 54 Fed.Cl. at 421, a salvage company made a contract with a non-profit foundation to buy aircraft hulks. The sale was conditional upon the foundation's procurement of the hulks from a United States Navy museum. Thereafter the museum made a contract to sell the hulks to the foundation. The court held that the company was an intended beneficiary of the museum-foundation contract, as both parties were "aware" of the foundation's commitment to sell the hulks to the company. *Id.*

This circumstance is relevant to a claim for excessive water charges. In *Pond v. New Rochelle Water Co.*, 183 N.Y. 330, 76 N.E. 211 (1906), for example, a water company promised a city to provide water to its inhabitants at a rate not exceeding a certain amount. The company later gave notice of its intent to charge higher rates. A customer was allowed to sue as an intended third-party beneficiary of the company's promise to the city. The court said: ". . . [W]e have a municipality entering into a contract for the benefit of its inhabitants, the object being to supply them with . . . water at reasonable rates.. . . [I]t cannot be said that this contract was made for the benefit of a stranger." *Id.* at 338.

Here, each water user pays the charge specified in the 1963 contract for each acre-foot of water delivered. Furthermore, each landowner is assessed a certain amount per acre to repay the costs of constructing the intradistrict distribution facilities. In addition, each excess landowner agreed to sell, and sold, his or her lands at a value which did not take into account the federal water supply. These circumstances imply that the

farmers were intended to benefit from performance and, therefore, to be entitled to sue for its breach.

C. The Farmers are Intended Beneficiaries, Because they Reasonably Relied on the Parties' Intent to Benefit Them

Henderson stated that implied intention may be ascertained by asking whether the beneficiary would be "reasonable in relying on the promise" as manifesting an intention to confer a right (quoting *Montana v. United States*, 124 F.3d 1269, 1273 (Fed.Cir. 1997)). 53 Fed. Cl. at 52. The government conceded that the farmers would "reasonably expect to be helped (or injured)" by the contract. *Id.* Accordingly, the court found the farmers would be "reasonable in relying on the promise" of the government to their district. *Id.*[50]

In the 1963 contract the Bureau promised it would sell 900,000 acre-feet of water each year for $7.50 per acre-foot. The 1965 contract also obligated landowners to pay per-acre assessments. At all times, the farmers have used the water to irrigate crops and paid all charges and assessments required.

In the late 1960s and early 1970s excess landowners, in reliance on Bureau promises, entered recordable contracts agreeing to sell such lands at without-water prices. The 1986 settlement explicitly recognized the farmers' intended beneficiary status and right to sue. Pursuant to the 1963 contract, as enforced in the 1986 stipulated judgment, and their recordable contracts, excess land owners sold their lands at such prices, and new settlers bought such lands. This circumstance also confirms the parties' intention to provide the farmers with the benefit of performance, as well as the consequent right to sue.

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[50] Courts often find intended beneficiary status citing the circumstance of reasonable reliance. *E.g.*, *Audio Odyssey*, 255 F.3d at 521 (quoting *Montana*, 124 F.3d at 1273); *Carlow*, 40 Fed.Cl. at 781 (same); *Schuerman*, 30 Fed.Cl. at 431.

D. The Farmers are Intended Beneficiaries, Because The District is Their Surrogate

The court in *Allen Orchards* also relied on this circumstance: "The irrigation districts . . . act as a surrogate for the aggregation of farmers. They use no water themselves." 749 F.2d at 1576.

Henderson, effectively confirms the conclusion that a water district is a surrogate for its farmers. The district there was "created" by its farmers. 53 Fed.Cl. at 50. It possessed statutory duties "to protect the farmland" by building and operating drains and "to serve [its] constituent farmers" by building and operating levees to hold back surface flooding. *Id.* "The property interests of the plaintiff landowners are served and protected by the Henderson District." *Id.* [51]

In fact and law, a district is a surrogate for farmers. A water district with a reclamation contract has been called, in practical effect, nothing but an "intermediary" resorted to by the Bureau and the farmers. *Nampa,* 283 F. at 570. The Ninth Circuit, itself, referred to the District as a "middleman." *Barcellos & Wolfsen*, 899 F.2d at 824 n.16.

A water district is properly treated for certain other purposes by this Court as a special-purpose unit, not a general-purpose government. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 728-29 (1973) (a water district has a "special limited purpose," and the "reason for its existence" is to acquire, store, and distribute water for its farmers, not to exercise "normal governmental" authority); *Ball v. James*, 451 U.S. 355, 366-72 (1981) ("water functions

[51] Individuals who are members of or served by other special or limited government units which make a federal contract may sue the United States as intended beneficiaries. *E.g., Carlow*, 40 Fed.Cl. at 780-83 (Indian tribe); *Busby School*, 8 Cl.Ct. at 601-02 (school board); *Hebah v. United States*, 428 F.2d 1334,1338-40 (Ct.Cl. 1970) (Indian tribe).

. . . are the District's primary purpose" and such districts are public entities only in a "nominal" sense).[52]

Often an aggrieved farmer can count on a district to mount a legal challenge to political action which threatens to violate rights without payment of compensation. But there are other situations, such as the instant case, where districts fail to do so and farmers are left to fend for themselves.[53] Here, water has been reallocated, surcharges have been collected, and the remedy sought is retrospective money damages. Even if the District had been willing to sue, there exists significant doubt as to whether it would have standing to assert and recover a water user's or landowner's damages.[54]

In the situation at bar, the District conducts no agricultural or other business of its own, except to operate the internal distribution system. It facilitates the exchange of water and money between the Bureau and the farmers. The District deals in no commodity other than water, and then only for the farmers' account. It enjoys no source of income other than the charges and assessments it collects from its landowners and water users. This circumstance, too, confirms that parties

[52] California law is similar. *Wood v. Imperial Irrigation District*, 216 Cal. 748, 755, 17 P.2d 128, 131-32 (1932); *Not About Water v. Board of Supervisors*, 95 Cal.App.4th 982, 999-1000, 116 Cal.Rptr.2d 526, 536-39 (2002); *see also Just's, Inc. v. Arrington Construction Co.*, 99 Idaho 462, 465, 467, 583 P.2d 997 (1978) (local district is "the most convenient means" of financing and constructing improvements, which constitute "a direct and special benefit to the property within the district, not merely an incidental benefit shared by the general public.").

[53] An irrigation district is a trustee for the landowners and water users within it. *Bryant*, 447 U.S. at 371; *Allen v. Hussey*, 101 Cal.App.2d 457, 467, 225 P.2d 674, 680 (1950). If a trustee fails to sue a third party on behalf of a trust, the beneficiaries may do so. *Bowdoin College v. Merritt*, 54 F. 55, 60 (9th Cir. 1893); *Saks v. Damon Raike & Co.*, 7 Cal.App.4th 419, 427-28, 8 Cal.Rptr.2d 869, 875 (1992).

[54] Petitioners are aware of no case allowing a district to recover lost profits or diminished values arising from underdeliveries.

intended to confer the benefit of performance on the farmers and, thus, the right to sue.

IV. THE STIPULATED JUDGMENT EXPLICITLY PROVIDES THAT THE FARMERS ARE INTENDED THIRD-PARTY BENEFICIARIES OF THE 1963 CONTRACT

A stipulated judgment settling water rights disputes under a reclamation contract is binding on the parties, including the Bureau. *Nevada,* 463 U.S. at 128-44; *Allen Orchards*, 749 F.2d at 1576.[55]

The test of intended beneficiary status is whether the contract (or, here, stipulated judgment) was intended for the plaintiff's direct benefit. *German Alliance*, 226 U.S. at 230; *Hendrick*, 93 U.S. at 147. Such status is established where the promise is plainly made for the plaintiff's benefit. *Crumady*, 358 U.S. at 428.

In the case at bar, the Bureau, the District, representatives of pre-merger lands, and representatives of merged lands litigated various disputes between 1979 and 1986, including previous overcharges and underdeliveries by the Bureau. The case was resolved by the 1986 stipulated judgment which in part construed and in part modified the 1963 contract and enforced it as so construed and modified. JA 101-47. The stipulated judgment resolved any doubts that might have existed as to whether the farmers are intended beneficiaries.

Paragraph 4.2 of the stipulated judgment provides, as follows: "The District acknowledges that it entered into the 1963 contract for the benefit of the [pre-merger area] and the lands therein." This explicit acknowledgment by the District, in a stipulated judgment executed by and binding on the

[55] A person who is not a party to an action may enforce an order made in his or her favor. FED. R. CIV. P. 71.

Bureau, is dispositive. The parties to the 1963 contract intended to benefit directly the petitioners' lands.

Paragraph 3 allows any party to obtain relief from a violation of the stipulated judgment in certain ways. In particular, it provides that "any other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of . . . any contract or other right or obligation arising independently of this judgment . . ." In this paragraph, the parties went beyond what was required by the *German Alliance* test. They made explicit that petitioners could sue the Bureau if it breached the 1963 contract.[56]

The Court below plainly errs in its reading of Paragraph 23 of the stipulated judgment, stating it refers to a statute to which it does not, in fact, refer. It states that Paragraph 23 of the stipulated judgment provides that it shall not be considered a contract "for purposes of [43 U.S.C.] § 390uu," which is Section 221 of the 1982 act. Pet.App. A at 16a. Paragraph 23 states, instead, that the stipulated judgment is not a contract "as described in Section 203(a) of the 1982 Act," which is 43 U.S.C. § 390cc(a). The section mistakenly referenced by the court is a sovereign immunity provision which applies broadly to any type of reclamation contract. *Tacoma v. Richardson*, 163 F.3d 1337, 1340 (Fed. Cir. 1998). By contrast, the section actually referenced in Paragraph 23 applies narrowly only to new contracts or contracts providing supplemental or additional benefits. *Barcellos & Wolfsen*, 899 F.2d at 817; *Westlands*, 134 F.Supp.2d at 1119-20. The purpose of Paragraph 23, as stated by the parties in the court-approved settlement notice, was simply to declare that the stipulated judgment shall not render the acreage and rate

[56] The court-approved settlement notice advised pre-merger area farmers that their rights under the 1963 contract, by being enforced in the 1986 stipulated judgment, are "directly enforceable." AER 27/528.

provisions of the 1982 act applicable to all District lands under the narrower of the two statutes. AER 27/521, 524.[57]

The key paragraphs of the 1986 stipulated judgment, including Paragraphs 3 and 4.2, establish unmistakably that the parties intended to benefit pre-merger area lands and to allow farmers to sue for breach. The parties to the 1963 contract explicitly stated in 1986 whatever might have been needed to confirm intended beneficiary status, and more.

V. THE BUREAU IS PRECLUDED BY PRIOR JUDGMENTS FROM CHALLENGING THE FARMERS' RIGHT TO SUE FOR BREACH OF THE 1963 CONTRACT

The policies advanced by preclusion doctrines "perhaps are at their zenith" in water cases. *Nevada,* 463 U.S. at 129 n.10. Claim preclusion bars litigation of any defense that might have been asserted in a prior case. *Id.* at 130; *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 170-71 (1984); *Durfee v. Duke*, 375 U.S. 106, 112 (1963). Issue preclusion bars relitigation of a defense. *Nevada*, 463 U.S. at 130 n.11; *Chicot County Drainage District v. Baxter State Park*, 308 U.S. 371, 378 (1940), *reh'g denied*, 309 U.S. 695 (1940); *United States v. Moser*, 266 U.S. 236, 242 (1924).

In the case at bar, the Bureau has unsuccessfully litigated, and has missed several other opportunities to litigate, its defense that farmers are not entitled to sue for breach of the price and delivery terms of the 1963 contract.

During the early stages of the 1979-1986 litigation, the district court held, in a published opinion, that the farmers

[57] The court below also notes the district court's statements about the recovery of money damages. Pet.App.A at 16a n.7. Damages are "always the default remedy for breach of contract." *Winstar*, 518 U.S. at 885 (Souter, J., plurality). Damages are a proper remedy if the farmers are intended beneficiaries. *Westlands*, 134 F.Supp.2d at 1156 n.97; *Sumner Peck Ranch*, 823 F.Supp at 746.

could sue to enforce the 1963 contract price and quantity articles. *Barcellos & Wolfsen*, 491 F.Supp. at 266-67. Paragraphs 3 and 4.2 of the 1986 stipulated judgment specifically decree that the farmers were intended to benefit from performance of the 1963 contract and could sue for its breach.

In subsequent cases, farmers continued to sue the Bureau for breach of the 1963 contract. Two suits raised claims under the price terms. *Barcellos & Wolfsen*, 899 F.2d at 816, 824-25 n.17; *Westlands*, 134 F.Supp.2d at 1117-18, 1138-39. One involved claims under the quantity terms. *O'Neill*, 50 F.3d at 682. In none of these cases did the Bureau contend that the farmers were not entitled to sue.

For these reasons, the Bureau is barred at this late date from denying petitioners' right to sue under the doctrines of claim and issue preclusion.

CONCLUSION

This Court should reverse the holding of the Ninth Circuit that the petitioners were not entitled to sue the Bureau. Pet. App. A. at 5a-17a. It should also reverse its holding that the district court rulings on the merits be vacated as nullities. *Id.* at 17a-20a. The Court should remand the case to the Ninth Circuit with direction to review the district court's merits rulings.

Respectfully submitted,

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(16)

No. 03-1566

In the Supreme Court of the United States

FRANCIS A. ORFF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Petitioners are California farmers who purchase irrigation water from the Westlands Water District. They sued the United States and federal officials for money damages, alleging that the United States, which supplies water to the Westlands Water District in accordance with a water service contract that the United States entered into under the federal reclamation laws, breached its contractual obligations to Westlands. The question presented is:

Whether the court of appeals correctly determined that petitioners could not sue the United States for an alleged breach of Westlands' contract with the United States because petitioners are not intended third-party beneficiaries of that contract.

PARTIES TO THE PROCEEDING

The parties to the proceeding are correctly identified in petitioners' brief (Br. ii), except that the current Secretary of the Interior is Gale Norton and the current Secretary of Commerce is Donald L. Evans. See Sup. Ct. R. 35.3.

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43 U.S.C. 512 4
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9 Arthur L. Corbin, *Corbin on Contracts* (Interim ed. 2002) 27, 29, 30
62 Cong. Rec. (1922):
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Melvin A. Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358 (1992) 30
55 Fed. Reg. 46,515 (1990) 11
58 Fed. Reg. 12,854 (1993) 10
4 William Fratcher, *Scott on Law of Trusts* (4th ed. 1987) 44
General Accounting Office, Rep. No. 81-07, *Federal Charges for Irrigation Projects Reviewed Do Not Cover Costs* (1981) 6
General Accounting Office, Rep. No. 96-109, *Bureau of Reclamation: Information on Allocation and Repayment of Costs of Constructing Water Projects* (1996) 6
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13 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* (4th ed. 2000) 47
18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure (2002) .....

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 358 F.3d 1137. The opinion and order of the district court on the United States' motion for reconsideration (Pet. App. 23a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2004. The petition for a writ of certiorari was filed on May 18, 2004, and was granted on October 12, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the federal reclamation laws are set out in the addendum to this brief.

STATEMENT

Congress enacted the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, and subsequent related legislation, to provide federal financing, construction, and operation of water storage and distribution projects. The California Central Valley Project (CVP), which provides irrigation water to state water districts for distribution to occupants of arid lands in California, is one such reclamation project. In recent years, the United States has reduced the amount of CVP irrigation water that it delivers to some state water districts, such as the Westlands Water District (Westlands), to comply with congressional mandates respecting endangered and threatened fish and wildlife.

Petitioners, who are individual farmers and farming entities that purchase CVP irrigation water from Westlands, filed suit against the United States and various federal officials, alleging that the reduced water deliveries breach a 1963 water service contract between the United States and Westlands (the Westlands Contract). Petitioners, who claim the right to enforce the Westlands Contract as intended third-party beneficiaries, sought money damages for the alleged breach. The district court held that petitioners could not sue for violation of the Westlands Contract because they are neither parties to, nor intended third-party beneficiaries of, that contract. Pet. App. 23a-46a. The court of appeals affirmed in relevant part, holding that, because the United States and Westlands expressed no intent that petitioners would have the right to enforce the Westlands Contract, petitioners are not intended third-party beneficiaries of that contract. *Id.* at 9a-14a.

A. The Federal Reclamation Laws

Congress's enactment of the Reclamation Act of 1902 initiated "a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States." *California* v. *United States*, 438 U.S. 645, 650 (1978). Congress originally envisioned that the United States would "withdraw from public entry arid lands in specified Western States, reclaim the lands through irrigation projects," and then "restore the lands to entry pursuant to the homestead laws and certain conditions imposed by the Act itself." *Nevada* v. *United States*, 463 U.S. 110, 115 (1983). Congress specifically directed, in Section 8 of the Reclamation Act of 1902, that the United States would act in accordance with state law to acquire title to the water used. 32 Stat. 390 (codified in part at 43 U.S.C. 383). See *California*, 438 U.S. at 650-651.

Congress gave the Department of the Interior responsibility for constructing reclamation projects and for administering the distribution of water to agricultural users in a project service area. See Reclamation Act of 1902, ch. 1093, §§ 2-10, 32 Stat. 388-390. Congress further provided, under a 1912 amendment of the 1902 Act, that individual water users served by a reclamation project could acquire a "water-right certificate" by proving that they had cultivated and reclaimed the land to which the certificate applied. Act of Aug. 9, 1912, ch. 278, § 1, 37 Stat. 265 (43 U.S.C. 541). Congress required that the individual's land patent and water right certificate would "expressly reserve to the United States a prior lien" for the payment of sums due to the United States in connection with the reclamation project. § 2, 37 Stat. 266 (43 U.S.C. 542).

In 1922, Congress enacted legislation permitting the United States to contract with "any legally organized irrigation district," rather than with the individual water users. Act of May 15, 1922, ch. 190, § 1, 42 Stat. 541 (43 U.S.C. 511). In that situation, the United States would be entitled to release liens against individual landowners, provided that the landowners agreed to be subject to "assessment and levy for the collection of all moneys due and to become due to the United States by irrigation districts formed pursuant to State law and with which the United States shall have entered into a contract therefor." § 2, 42 Stat. 542 (43 U.S.C. 512). In 1926, Congress enacted additional legislation providing that, thenceforth, the United States may enter into contracts for new reclamation projects *only* with "an irrigation district or irrigation districts organized under State law." Act of May 25, 1926, ch. 383, § 46, 44 Stat. 649 (codified as amended at 43 U.S.C. 423e). As a result of the 1926 legislation, the United States was to contract exclusively with irrigation districts, and those irrigation districts would then be responsible for discharging the contractual obligations.[1]

[1] The legislative history of the 1922 act, which allowed the government to contract with irrigation districts, shows that Congress recognized that there would be significant operational differences in dealing with irrigation districts rather than directly with individual farmers. See H.R. Rep. No. 662, 67th Cong., 2d Sess. 2 (1922) ("the Federal Government is dealing with the irrigation district instead of the individual owner or water users' association"); 62 Cong. Rec. 3573 (1922) (statement of Rep. Kinkaid) ("This language authorizes the taking of the district collectively, taking the lands of the district collectively, for the payment of the cost of the construction of the irrigation works, in lieu of holding each farm unit singly for its proportionate share of the cost of construction."); *id.* at 3575 (statement of Rep. Mondell) ("The Reclamation Service has for years encouraged the organization of irrigation districts

Congress envisioned that structuring reclamation contracts as enforceable obligations between the United States and the irrigation districts would better suit the needs of all concerned. The United States benefitted from contracting with irrigation districts because the districts provided the United States with a centralized and more reliable source for repayment of the project costs. The irrigation districts—which, by virtue of their taxation or assessment authority under state law, could collect reclamation charges from the individual landowners—had enhanced power to negotiate and seek enforcement of contracts and to resolve any ensuing disputes based on the collective interests of the landowners within the district's geographic boundaries. They also brought local governmental control and responsibility to the reclamation effort. And the individual water users benefitted because they would not incur direct individual contractual responsibilities to a distant national government, and they would not be subject to burdensome liens on their lands.[2]

* * * whereby the water users as a body, as a whole, become responsible for all of the charges.") *id.* at 5859 (statement of Sen. McNary) ("the Government is dealing with organized irrigation districts rather than the various individual entrymen who take water in the projects").

[2] See H.R. Rep. No. 662, *supra*, at 1 (noting the legislation's "beneficial effects"); 62 Cong. Rec. at 3574 (statement of Rep. Hayden) (irrigation districts would provide "vastly better security for the repayment of the sums due to the United States," whereas by avoiding liens, individual water users would qualify for federal farm loans); *id.* at 5859 (statement of Sen. McNary) ("In a word, it is to the advantage of the Federal Government and the entrymen and water users in various irrigation districts. * * * [T]he Government takes the bonds of the district rather than the securities of the individual entrymen."). In 1939, Congress authorized the United States to enter into water-service contracts and repayment

Congress expected that the reclamation laws, which require the irrigation districts to reimburse the United States for water delivery costs through long-term water service contracts, would produce a financing mechanism that would allow the government to recoup the costs of constructing and operating the reclamation projects. See 43 U.S.C. 391, 492, 493, 423e, 423f. The financing mechanism, however, has generally provided inadequate funds to achieve that goal. In the case of the CVP, the United States' water service contracts with the irrigation districts are insufficient to return more than a fraction of the project's costs. See *City of Fresno* v. *California*, 372 U.S. 627, 631 (1963).[3]

contracts with organizations other than irrigation districts, in recognition that reclamation projects such as the CVP were being used for purposes other than storing and delivering water for irrigation, such as municipal water supply and electric power generation. Act of Aug. 4, 1939, ch. 418, § 9, 53 Stat. 1193 (43 U.S.C. 485h). But Congress retained Section 423e's requirement that, insofar as reclamation is concerned, the Bureau must contract with irrigation districts rather than individual irrigators.

[3] Congressional studies have concluded that shortfalls under the reclamation program have arisen because: (1) Congress has spread project repayment obligations over several decades, but has not required payment of interest on the costs of the project; (2) Congress has limited the repayment obligation to only those costs that are considered within the irrigation district's ability to pay; and (3) Congress has enacted charge-offs that selectively eliminate portions of the repayment obligations in the case of certain projects. See General Accounting Office, Rep. No. 96-109, *Bureau of Reclamation: Information on Allocation and Repayment of Costs of Constructing Water Projects* 15-22 (1996); General Accounting Office, Rep. No. 81-07, *Federal Charges for Irrigation Projects Reviewed Do Not Cover Costs* 11 (1981).

B. The California Central Valley Project

The CVP is "a gigantic undertaking to redistribute the principal fresh-water resources of California" and, specifically, to "to re-engineer" the "natural water distribution" of California's Central Valley. See *Central Green Co.* v. *United States*, 531 U.S. 425, 432-433 (2001) (quoting *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 728 (1950)). The CVP includes a collection of dams, reservoirs, hydropower generating stations, canals, electric transmission lines, and other infrastructure used to accomplish the project's purposes. See *id.* at 433 (citing *Gerlach*, 339 U.S. at 733). Congress initially authorized funds for the CVP in the Emergency Relief Appropriations Act of 1935, ch. 48, 49 Stat. 115. Congress reauthorized the Project as a federal reclamation project in the Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 850. It has since amended or supplemented the 1937 Act many times. See, *e.g.*, California Bay-Delta Environmental Enhancement and Water Security Act, Pub. L. No. 104-208, Div. E, Tit. I, 110 Stat. 3009-748 (1996).

In 1963, the Department of the Interior's Bureau of Reclamation, acting pursuant to provisions of the federal reclamation laws authorizing contracts between the United States and state irrigation districts, 43 U.S.C. 423e, entered into a long-term water service contract with the Westlands Water District (Westlands). Pet. App. 3a; J.A. 30-88. At the time, the United States was in the process of constructing the San Luis Unit of the CVP. See Appellants Excerpt of Record (AER) 138. The Westlands Contract specifies that the United States shall furnish water to Westlands from the San Luis Unit and that Westlands shall pay

for that water. J.A. 34-36, 38-39. Article 3 of the Westlands Contract specifies the quantities of water to be sold annually. See J.A. 34. Article 11(a) of the Westlands Contract releases the government from liability for water shortages caused by "errors in operation, drought, or any other causes." See J.A. 42-43.[4]

The United States and Westlands fully satisfied their contractual obligations under the Westlands Contract for 15 years without major controversy. Except for one year of drought, the CVP delivered a minimum of 900,000 acre-feet of water annually to petitioners and other water users within Area I of the Westlands District.[5] In 1978, however, the Solicitor of the Interior issued an opinion stating that the Bureau of Reclamation could not lawfully deliver water under the

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[4] Because Congress sought, through federal reclamation projects such as the CVP, to encourage the development of small family farms and to discourage land speculation, it placed restrictions on the delivery of federal reclamation water to larger landowners. See 43 U.S.C. 423e. Article 25 of the Westlands Contract—like other federal reclamation contracts—limits the water that would be made available to persons who own more than 160 acres (or, for a married couple, 320 acres) of irrigable land within the Westlands Water District. J.A. 51-52. Article 25 specifies that, before receiving any water made available under the Westlands Contract, each such landowner must execute a "valid recordable contract" with the United States that, among other things, requires the landowner to dispose of the "excess land" within ten years. *Ibid.* Many of the landowners within the Westlands Water District executed such contracts. AER 231-241.

[5] The current Westlands Water District was formed in 1965 by the merger of the Westlands and Westplains Water Districts. See Westlands Water District Merger Law, Cal. Water Code §§ 37800-37856 (West 1982 & Supp. 2004). Petitioners' lands are situated within the area of the original Westlands Water District, which is now known as "Area I."

Westlands Contract until Westlands entered into a repayment contract that would recover the cost of the irrigation distribution works that the United States had constructed. See *Westlands Water District—Legal Questions*, Solicitor Opinion No. M-36901, 85 Interior Dec. 297 (1978). As a result of the Solicitor's decision, the United States refused to deliver water unless Westlands entered into interim contracts that provided for the payment of increased charges. The United States' position led to litigation brought by irrigators against Westlands, which prompted Westlands to attempt to join the United States as an indispensable party. See *Barcellos & Wolfsen, Inc.* v. *Westlands Water Dist.*, 491 F. Supp. 263, 264-265 (E.D. Cal. 1980).[6]

The Solicitor of the Interior ultimately rescinded the 1978 opinion. See *Westlands Water District*, Solicitor Opinion M-36901 (Supp. I) (June 17, 1986) (unpublished). In 1986, upon a stipulation among the parties, the United States District Court for the Eastern District of California entered a judgment (the 1986 Judgment) requiring the United States to provide water deliveries in accordance with the original Westlands Contract. AER 242-297. See *O'Neill* v. *United States*, 50 F.3d 677 (9th Cir. 1995) (affirming district court's denial of a motion to enforce the 1986 Judgment), cert. denied, 516 U.S. 1028 (1995).

[6] Congress subsequently enacted the Reclamation Reform Act of 1982, Pub. L. No. 97-293, Tit. II, 96 Stat. 1263, which, among other things, granted Congress's consent "to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law." § 221, 96 Stat. 1271 (codified at 43 U.S.C. 390uu). See pp. 20-25, *infra*.

C. The Current Dispute

In 1992, Congress enacted the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, 106 Stat. 4706, which amended the 1937 law that had reauthorized the CVP as a reclamation project. The CVPIA was enacted to achieve "a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors." CVPIA § 3402(f), 106 Stat. 4706. The CVPIA directs the Bureau of Reclamation, among other things, to reallocate more than one million acre-feet of water away from irrigation to environmental restoration purposes. CVPIA §§ 3406(b)(2) and (d)(1), 106 Stat. 4715-4716, 4722-4724.

In February 1993, the Bureau announced its initial allocation of CVP water for 1993. See Pet. App. 3a. Under the Bureau's allocation, water districts north of the Sacramento-San Joaquin Delta would receive 100% of their maximum contractual supplies of CVP water. Other water districts, south of the Delta, including Westlands, would receive only 50% of their maximum contractual supply of CVP water. See *ibid.* The Bureau imposed those limitations in light of the requirements of the CVPIA and the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, which directs the federal government to restrict actions that jeopardize endangered or threatened species.[7]

[7] The Bureau of Reclamation concluded, based on findings of the Department of the Interior's Fish and Wildlife Service and the Department of Commerce's National Marine Fisheries Service, that pumps used to deliver water south of the Delta can harm winter-run chinook salmon and delta smelt, which are listed as threatened species under the ESA. See 58 Fed. Reg. 12,854 (1993)

In May 1993, Westlands filed an action challenging the Bureau's delivery reductions. See Pet. App. 3a-4a, 25a; Westlands Excerpts of Record (WER) 1-18. Westlands' complaint alleged that the defendants had violated the Due Process and Just Compensation Clauses of the United States Constitution, U.S. Const. Amend. V; the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*; and the ESA. See WER 10-15. Westlands requested injunctive relief and money damages. See WER 16. Westlands, joined by three other water districts, later filed an amended complaint (the first amended complaint). The first amended amended complaint set forth claims that were virtually identical to those alleged in Westlands' original complaint. See J.A. 1 (Docket Entry 16).

A number of other individuals and entities, including petitioners, subsequently intervened. As a result of intervention, the plaintiffs consisted essentially of two groups: (1) water districts, water agencies, and irrigation districts; and (2) petitioners, who are landowners and water users who purchase water from Westlands. The defendants consisted of the United States, federal agencies, and a variety of intervening fishing and wildlife-protection groups. See Pet. App. 4a, 25a. Over time—and largely as a result of various negotiations and agreements among the State of California, the federal government, and urban, agricultural, and environmental interests—many of the concerns that had led the water districts and irrigation districts to file suit

(delta smelt); 55 Fed. Reg. 46,515 (1990) (chinook salmon). The Bureau imposed operating restrictions on the pumps to reduce losses to those species, which in turn reduced the amount of water that the Bureau could deliver south of the Delta. See *Barcellos & Wolfsen, Inc.* v. *Westlands Water Dist.*, 849 F. Supp. 717, 720-721, 724 n.13 (E.D. Cal. 1993).

were resolved. Accordingly, in September 1995, the districts dismissed their complaint, leaving only the claims of the water users, who are the petitioners before this Court. See *ibid.*

Petitioners pressed forward with numerous claims, including the cause of action at issue here, which alleges that the United States is liable to petitioners in money damages for an alleged breach of the Westlands Contract. See WER 40-41. Petitioners predicated that claim on 43 U.S.C. 390uu, which grants Congress's consent "to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law." See Pet. App. 4a-5a, 26a, 47a; see also note 6, *supra*; Add., *infra*, 3a. Petitioners contended that Section 390uu not only waives the United States' sovereign immunity from joinder by Westlands as a necessary party defendant in a suit involving the Westlands Contract, but also subjects the United States to an individual farmer's independent suit directly against the United States seeking money damages for violation of the Westlands Contract. See Pet. App. 4a-5a, 26a; WER 34.

The district court denied the parties' cross-motions for summary judgment. Each of the parties then sought reconsideration. The federal government contended, among other things, that Section 390uu's waiver of sovereign immunity does not allow petitioners to sue under the Westlands Contract because petitioners are not intended third-party beneficiaries of that contract. On reconsideration, the district court agreed, holding that petitioners are not intended third-party beneficiaries because the Westlands Contract does not manifest an intention that petitioners would

have the right to enforce the contract against the United States. Pet. App. 27a-34a. The district court also ultimately ruled in favor of the United States on the merits of all of petitioners' claims and entered final judgment against petitioners. *Id.* at 21a-22a.

The court of appeals affirmed in part and vacated in part. Pet. App. 1a-20a. Although petitioners raised and the court addressed numerous issues, only one is relevant here. The court of appeals agreed with the district court that petitioners are not intended third-party beneficiaries of the Westlands Contract who may seek enforcement of the contract against the United States. *Id.* at 5a-17a. The court relied on its prior decision in *Klamath Water Users Protective Ass'n* v. *Patterson*, 204 F.3d 1206 (9th Cir. 1999), cert. denied, 531 U.S. 812 (2000), which recognized that:

> Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary.

Pet. App. 10a (quoting *Klamath*, 204 F.3d at 1211). The court of appeals reviewed the various provisions of the Westlands Contract, as well as petitioners' other claimed indicia of third-party beneficiary status. *Id.* at 10a-17a. The court concluded that petitioners had failed to show that the United States and Westlands manifested any intention that petitioners would be entitled to enforce the Westlands Contract and that sovereign immunity therefore barred petitioners' suit. *Id.* at 17a. The court of appeals accordingly vacated the district court judgment to the extent that it addressed the merits of petitioners' claims. *Id.* at 17a-20a.

SUMMARY OF ARGUMENT

The court of appeals correctly ruled that petitioners cannot sue the United States for an alleged breach of the Westlands Contract because petitioners are not intended third-party beneficiaries of that contract.

A. Petitioners' contention that they are intended beneficiaries is flawed at the outset because Congress has neither authorized the Secretary of the Interior to grant petitioners rights to enforce the Westlands Contract nor empowered the courts to adjudicate such enforcement claims. At the time of the Westlands Contract, Congress had specifically directed that the Secretary could contract only with irrigation districts and not individual farmers. Congress's decision to limit contracting to irrigation districts indicates that Congress did not intend for the Secretary to enter into contracts that would nevertheless give the farmers third-party enforcement rights. Furthermore, Congress has never waived the United States' sovereign immunity from third-party suits. The sovereign immunity waiver on which petitioners rely, 43 U.S.C. 390uu, allows only the joinder of the United States for declaratory relief at the request of a contracting party, which, in the case of the Westlands Contract, would be limited to an irrigation district. It does not allow suits by individual water users directly against the United States and does not, in any event, allow suits for damages.

B. Petitioners' claim that they are intended third-party beneficiaries is also inconsistent with the Westlands Contract, which does not grant individual water users the right to sue the United States for breach of that contract. Under familiar principles of contract law, a third party cannot enforce a contract unless the contracting parties express their intention to confer

that right. That rule is rigorously followed in the case of government contracts, and it has particular force in the case of a contract between the United States and a state governmental entity. As the court of appeals correctly recognized and petitioners readily concede, the Westlands Contract contains many detailed terms, but it makes no mention whatsoever that individual water users would be entitled to enforce the contract.

C. Petitioners ultimately argue that they should be entitled to enforce the Westlands Contract because either the Westlands Contract or other extra-contractual sources impliedly grant them that right. But even if a private third-party right to enforce a contract between two governmental entities could arise by implication in another context, no such implication would be warranted here. Contrary to petitioners' contentions, none of the provisions of the Westlands Contract implies that petitioners would have a right to sue the United States to enforce the contract. Those provisions recognize, at most, that the water users are incidental beneficiaries. Petitioners are also wrong in suggesting that the "surrounding circumstances" create such an implication. Finally, there is no merit to petitioners' contention that a prior stipulated judgment dealing with different issues could give petitioners a right to sue the United States for breach of the Westlands Contract or preclude the United States from challenging petitioners' unwarranted claim of third-party enforcement rights.

ARGUMENT

PETITIONERS CANNOT SUE THE UNITED STATES FOR AN ALLEGED BREACH OF THE WESTLANDS CONTRACT BECAUSE PETITIONERS ARE NOT INTENDED THIRD-PARTY BENEFICIARIES OF THAT CONTRACT

Petitioners' assertion of a right to seek enforcement of the Westlands Contract fails on three related bases. First, Congress did not authorize the United States to enter into reclamation contracts with Westlands that would grant petitioners the right to enforce the contract as third-party beneficiaries, nor does 43 U.S.C. 390uu provide a corresponding waiver of sovereign immunity that would allow the courts to adjudicate such suits. Second, the Westlands Contract makes no mention of granting petitioners a right to sue the United States for breach of that contract. And third, even if such a right could arise by implication, the Westlands Contract, both on its own terms and when considered in its surrounding circumstances, does not impliedly grant petitioners a right to sue the United States for breach of the contract.

A. Congress Has Neither Authorized The Secretary Of The Interior To Grant Petitioners Third-Party Rights To Enforce The Westlands Contract Nor Empowered The Courts To Enforce Such Rights

Petitioners' theory that it may enforce asserted third-party beneficiary rights against the United States is flawed at the threshold, because Congress has neither authorized the Secretary of the Interior to create such rights in the Westlands Contract nor empowered the courts to adjudicate those supposed rights.

1. *Congress authorized the Secretary of the Interior to contract only with the irrigation districts*

Executive officers may enter into contracts only insofar as Congress has authorized those officers to create binding obligations on the national government and its Treasury. See U.S. Const. Art. I, § 9, Cl. 7; 31 U.S.C. 1341 (Anti-Deficiency Act). As this Court has explained, "[a]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 425 (1990). That limitation is necessary "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Id.* at 428.

In the case of the CVP, Congress has authorized the Secretary of the Interior to enter into contacts in which the United States agrees to provide for the delivery of irrigation water in exchange for money payments to recover the costs of providing the water. Congress has specified, in pellucid terms, that the Secretary may enter into contracts only with *irrigation districts*:

> No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made *with an irrigation district or irrigation districts organized under State law* providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid with such terms of years as the Secretary may find necessary.

43 U.S.C. 423e (emphasis added). Section 423e expressly limits the Secretary's authority to creating enforceable legal obligations between the United States and irrigation districts. It puts to an end the Secretary's earlier practice of creating such obligations between the United States and individual farmers. Section 423e provides, in its place, centralized contracting strictly between the United States and irrigation districts, which facilitates the formulation, enforcement, and modification of such agreements and the resolution of disputes arising under them. See pp. 4-5, *supra*.

Petitioners' theory that they are entitled to enforce the Westlands Contract is inconsistent with Congress's objective in requiring the Secretary to contract with irrigation districts. Congress originally provided that the United States would deliver reclamation project water by contract with individual water users. In return, the United States placed a lien on the individual's land. See page 4, *supra*. Under that system, the individual water user had a right to enforce the contract and a reciprocal obligation, secured by the lien, to pay the United States for the water. Under the current system, the United States enters into contracts with irrigation districts, formed pursuant to state law, that are responsible for repayment, thereby relieving individual owners of the direct repayment obligation and accompanying lien. Under petitioners' theory, they are entitled to an amalgam of both systems that grants them the benefits of the old system without the attendant obligations. They seek a right to enforce a contract between the United States and Westlands without the accompanying obligation, secured by a lien on

their property, to pay the United States directly for what they receive.

There is no basis in Section 423e to conclude that Congress intended to negate the effect of the move away from contracts with individual farmers by authorizing the Secretary to enter into contracts with irrigation districts that would in turn create enforceable rights in the same farmers to whom the irrigation districts would distribute the water. Although Section 423e describes in detail specific aspects of the Secretary's contracting authority, it makes no mention of any contracts with individual irrigators or the creation of third-party rights to enforce contractual obligations. See 43 U.S.C. 423e. See *American Paper Inst., Inc.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 421 (1983) (courts should not "imput[e] to Congress a purpose to paralyze with one hand what it sought to promote with the other") (internal quotation marks omitted).

When Congress enacted Section 423e in 1926, it acted in accordance with "the general principle, which proceeds on the legal and natural presumption, that a contract is only intended for the benefit of those who made it." *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230 (1912). It also acted in accordance with the familiar principle that government contracts do not impart third party rights unless they expressly so provide. See *id.* at 231. That principle should apply with particular force in a context in which Congress discards a policy of contracting with individual farmers in favor of contracts with irrigation districts. If Congress had intended to authorize "an exception to the general principle" that would grant third parties the "exceptional privilege" of suing on a contract between the United States and another governmental entity, *id.* at 230, at the same time that it discontinued its practice of direct contracts with individual farmers, it would have made that intention express. See *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979).

2. *Congress waived the United States' immunity from suit only for claims brought by the irrigation districts against the United States*

This Court has repeatedly recognized that the United States, as sovereign, cannot be sued in the absence of a waiver of sovereign immunity. See, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260-261 (1999). A congressional waiver of sovereign immunity must "be 'unequivocally expressed' in the statutory text" and "is to be strictly construed, in terms of its scope, in favor of the sovereign." *Id.* at 261 (quoting *Lane* v. *Peña*, 518 U.S. 187, 192 (1996)). Those principles are longstanding. See, *e.g.*, *United States* v. *Sherwood*, 312 U.S. 584, 586-589 (1941); *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 686 (1927); *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1867). Hence, if Congress had intended to authorize third-party beneficiary suits at the time of its enactment of Section 423(e), it would have provided a corresponding express waiver of the United States' sovereign immunity from such suits. Congress's failure to do so indicates that Congress did not authorize either the creation of third-party beneficiary rights or their enforcement against the United States.

Petitioners contend (Pet. Br. 11-12) that Congress provided them with a waiver of sovereign immunity for their third-party enforcement action through a pro-

vision of the Reclamation Reform Act of 1982 that, in pertinent part, provides:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law.

43 U.S.C. 390uu. Petitioners' reliance on that provision, which makes no mention whatsoever of third-party beneficiary suits but only the "rights of a contracting entity," is misplaced for three reasons.

First, Congress enacted Section 390uu in 1982, more than 50 years after Congress authorized the Secretary to contract with irrigation districts and nearly 20 years after the Secretary entered into the contract with Westlands. See Reclamation Reform Act of 1982, Pub. L. No. 97-293, Tit. II, § 221, 96 Stat. 1271. If Congress had intended that the Secretary's contracts with irrigation districts would create enforceable rights in third parties, Congress would not have waited until that late date to provide a waiver of sovereign immunity. Cf. *Trient Partners I Ltd.* v. *Blockbuster Entm't Corp.*, 83 F.3d 704, 713 (5th Cir. 1996) ("A third party beneficiary contract is only created if (1) the intent of the parties to the contract is clear that the promisor is assuming a direct obligation to the beneficiary; and (2) such intent is evidenced at the time that the contract is formed.").

Second, Section 390uu's express terms establish that this provision has nothing to do with allowing individual farmers to bring a third-party enforcement action against the United States. Congress gave consent to "*join*" the United States as a "*necessary defendant*" in a pre-existing action in order to allow the determination

of "the contractual rights of a *contracting entity* and the United States." 43 U.S.C. 390uu. See *Wyoming* v. *United States*, 933 F. Supp. 1030, 1039 (D. Wyo. 1996) (Section 390uu "speaks only of 'contracting entities,' i.e., parties to a contract with the United States"); Fed. R. Civ. P. 19(a). The scope of Section 390uu's waiver must, of course, be strictly limited to what Congress "unequivocally expressed." *Blue Fox*, 525 U.S. at 261; *Lane*, 518 U.S. at 192.[8]

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[8] Petitioners' attempt (Pet. Br. 12 n.24) to expand the scope of Section 390uu by reference to its legislative history is without merit. "A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane*, 518 U.S. at 192. In any event, the legislative history of Section 390uu does not support petitioners' construction. Although the Senate committee report referred to suits concerning the contractual rights of "parties or beneficiaries" of reclamation contracts, Congress adopted the House of Representatives' version of Section 390uu, which did not include the Senate version's reference to beneficiaries. Compare H.R. Rep. No. 458, 97th Cong., 2d Sess. 6 (1982) (bill allowing suits "to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States"), with S. Rep. No. 373, 97th Cong., 2d Sess. 5 (1982) (bill allowing suits "to adjudicate, confirm, validate, or decree the contractual right of any person or entity, including but not limited to any contracting entity, who is the beneficiary of any such [reclamation] contract"); see H.R. Conf. Rep. No. 855, 97th Cong., 2d Sess. 33 (1982) (noting that the Conference Committee adopted the House version). Moreover, although Representative Kazen did refer to the desire to "give the irrigation districts and their members access to the courts," that may have been a reflection of the fact that the provision would often be invoked by an irrigation district that had been sued by individual farmers. In any event, he described the provision that would become Section 390uu as "simply a matter of making certain that the districts, or individuals who have a contract, may have their day in court." 128 Cong. Rec. 8816 (1982).

Where, as here, the United States contracts with an irrigation district for the delivery of reclamation project water, Section 390uu's precisely phrased terms grant Congress's consent for an irrigation district to join the United States as a defendant in an ongoing suit between the irrigation district and its members. This, of course, was the precise situation presented in *Barcellos*, *supra*, where individual farmers sued Westlands, and Westlands then sought to bring a claim against the United States. See 491 F. Supp. at 265. Congress did not give its consent for a third party to bring a claim directly against the United States. To the contrary, Section 390uu clearly expresses Congress's understanding that individual farmers who were unhappy with their water allocations would sue the irrigation district, and the irrigation district would then have the option of joining the United States to resolve any dispute between the irrigation district and the United States over *their* contractual rights.

Third, Section 390uu would not, under any circumstances, allow petitioners' suit seeking money damages from the United States. As this Court has stated, "payments of money from the Federal Treasury are limited to those authorized by statute." *OPM* v. *Richmond*, 496 U.S. at 416. "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192. Accord *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). Section 390uu, which authorizes courts only "to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States," does not waive the United States' immunity from *monetary* claims, even as to disputes between the irrigation district and the United States. Although the

lower courts have not necessarily paid close heed to Section 390uu's carefully circumscribed language in all respects, they have correctly recognized that Section 390uu does not authorize courts to award money damages. See *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667, 674 (9th Cir. 1993) ("We conclude that this statutory provision waives sovereign immunity in this case, where appellants are seeking injunctive and declaratory relief under [reclamation] contracts."); *Wyoming*, 933 F. Supp. at 1038 ("This statute waives the United States' sovereign immunity from a declaratory relief action brought by a party to a contract with the United States to establish the party's rights under that contract.").

Section 390uu provides an irrigation district that has been sued by individual farmers an opportunity to have its rights against the United States declared. The irrigation district thus has an opportunity to sue the United States in contract subject to the jurisdictional rules of the Tucker Act, most often in the court of federal claims. Section 390uu's structure, thus, reinforces petitioners' inability to sue the United States. It assumes that the individual farmer's remedy will lie in a suit against the irrigation district in a federal or state court, and it attempts to ameliorate any unfairness to the irrigation district from inconsistent judgments by allowing a declaration of its rights against the United States, which could then be enforced in the court of federal claims. Petitioners' construction of Section 390uu would result in a dramatic departure from the normal provisions for suing the government for claims

arising out of a contract by allowing a suit for money damages in a district court.[9]

B. The Westlands Contract, By Its Terms, Does Not Grant Petitioners A Right To Sue The United States For Breach Of That Contract

Even if Congress had authorized the Secretary of the Interior to grant water users third-party rights to enforce a contract with an irrigation district and had empowered the courts in this case to enforce such rights, petitioners' action would fail because the Westlands Contract does not grant petitioners the right to enforce the contract. The terms of the Westlands Contract manifest no intention on the part of the contracting parties to confer enforceable rights on individual water users under the contract, and the statutory scheme—even if it were construed not to foreclose the conferral of such rights—at the very least strongly supports the conclusion that the contract should not be construed to do so.

1. *A third party cannot enforce a contract unless the contracting parties express their intention to confer that right*

Petitioners claim that they are third-party beneficiaries based on their construction of the Westlands

[9] Petitioners did not seek to bring a suit against the United States for money damages under the "little" Tucker Act, 28 U.S.C. 1346 (granting district courts jurisdiction over claims against the United States not exceeding $ 10,000) or the Tucker Act, 28 U.S.C. 1491 (granting the Court of Federal Claims jurisdiction over claims against the United States without regard to the amount). See, *e.g.*, *Montana* v. *United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (addressing a third-party beneficiary claim under the Tucker Act).

Contract, which is a contract solely between the United States and Westlands under the federal reclamation laws. See J.A. 30. Petitioners' claimed rights accordingly are governed by federal law. See *United States* v. *Seckinger*, 397 U.S. 203, 209-210 (1970). The Court may rely on traditional rules of contract law to guide its determination of federal law, as long as those rules are consistent with federal policies. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957).[10]

Under traditional contract law principles, petitioners can have no right to enforce a contract between two government entities—the United States and a state water district—unless the contracting parties manifested an intention to grant petitioners enforcement rights. See, *e.g.*, Restatement (Second) of Contracts § 438 (introductory note) (1981)("the power of promisor and promisee to create rights in a beneficiary" depends on their "manifesting an intention to do so"). That requirement is rigorously enforced in the case of government contracts. "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." *Id.* § 313 cmt. a. See, *e.g.*, *German Alliance Ins. Co.*, 226 U.S. at 230-231. That limitation is particularly compelling when the promisor is the United States, which is normally entitled to sovereign immunity, and the promisee is a state govern-

[10] Congress's decision to allow the Secretary to contract only with irrigation districts, 43 U.S.C. 423e, and to waive the United States' sovereign immunity only with respect to irrigation districts in prescribed circumstances, reflects an important legislative policy judgment that bears on the question of the parties' intent with respect to recognizing rights in third parties under the contract. See note 12, *infra*.

mental entity organized "for the benefit of the inhabitants collectively." *Id.* at 231.[11]

Petitioners suggest that they should qualify as third-party beneficiaries because they receive what they characterize as a "direct" benefit from the contract. As a threshold matter, petitioners' characterization is unsound. The Westlands Contract specifies rights and obligations that run strictly between the United States and Westlands. The Bureau delivers water to Westlands, and Westlands pays for it. Petitioners benefit from the contract only because Westlands in turn distributes the water to petitioners based on the separate legal relationship between Westlands and those water users. Petitioners do not, in the relevant sense, receive a "direct" benefit from the Westlands Contract. See *German Alliance Ins. Co.*, 226 U.S. at 231 (taxpayers receive only "indirect" benefits from municipal services).

The Westlands Contract does not dictate how Westlands allocates the water that it delivers to individual water users; rather, the distribution is determined through their association with Westlands. See Cal. Water Code Ann. § 35420 (West 1984). Petitioners benefit directly from their relationship with Westlands, but only indirectly from the Bureau's delivery of water to Westlands under Westlands Contract. See 9 Arthur

[11] There is no question that state irrigation districts are governmental entities. See *Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 721 (1973) (characterizing a California water storage district as a "particular type of local governmental unit"); *id.* at 723 (characterizing an irrigation district as a "local governmental unit"); see also *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112 (1896). California law regards irrigation districts as "instrumentalities of local government." *Turlock Irrigation Dist.* v. *Hetrick*, 81 Cal. Rptr. 2d 175, 177 (1999).

L. Corbin, *Corbin on Contracts* § 779D, at 39 (Interim ed. 2002) ("[W]here A is under a contractual duty to C the performance of which requires labor or materials, and B promises A to supply to him such labor or materials; C has no action against B on this promise."). The very nature of the statutory and contractual framework—expressly contemplating one relationship between the United States and the district on the one hand and a *separate* state-law contractual and statutory relationship between the district and the water users on the other—cuts strongly against concluding that individual water users *also* have rights (albeit implied) under the contract between the United States and the district.

Even if petitioners were deemed to receive a "direct benefit" in some sense from the Westlands Contract, such a benefit would not, by itself, qualify them as intended beneficiaries entitled to enforce the contract. See *German Alliance Ins. Co.*, 226 U.S. at 230 ("Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, *at least* show that it was intended for his direct benefit." (emphasis added)). Petitioners must additionally show that granting enforcement rights to third parties "is in accordance with the particular intent of those who made this agreement." *Id.* at 231-232. See Restatement (Second) of Contracts, *supra*, §§ 302, 304, 313.[12]

[12] Section 302 of the Restatement explains, with relevance to the situation here, that a beneficiary of a promise qualifies as an intended beneficiary only "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." In the case of government contracts, the extension of third-party

Courts distinguish "intended" third-party beneficiaries—who can sue under the contract—from "incidental" third-party beneficiaries—who cannot—by determining whether the contracting parties intended to confer enforcement rights on the third party. Restatement (Second) of Contracts, *supra*, §§ 302, 304. The Restatement reflects the prevailing view that it is not enough that the contracting parties envisioned that a third party would receive a benefit. Rather, as a leading commentator has explained, "the courts have generally construed the prerequisite of an 'intent to benefit' to mean an intent to confer on a third party an enforceable right concerning which the promisee and the promisor bargained." 13 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 37:8, at 79 (4th ed. 2000).[13]

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rights would additionally be inappropriate if it "would contravene the policy of the law authorizing the contract or prescribing remedies for its breach." Restatement (Second) Contracts, *supra*, § 313(1). See pp. 17-25, *supra* (discussing the policies of the federal reclamation laws in authorizing contracts and providing remedies). Accordingly, the promisor is generally not liable to third parties unless "the terms of the promise provide for such liability." Restatement (Second) Contracts, *supra*, § 313(2)(a).

[13] Although the Restatement and Williston embrace the prevailing view, another leading commentator has questioned that approach on the ground that, "[i]n the making of contracts parties do not often consciously advert to the legal relations that will be created by their expressions." See 9 Arthur L. Corbin, *supra*, § 777, at 21-24. Corbin instead has suggested looking for "an intent on the part of the promisee that the performance beneficial to the third party shall be rendered by the promisor." *Id.* at 22. But the example he offered to support that position was a case in which the promisor rendered performance under the contract directly to the third party, and an intent to give the third party the right to enforce the contract could be inferred from the manner in which

Federal and state courts have generally had little difficulty in applying the Restatement's sensible distinction, which emphasizes the primacy of the parties' objectively manifested intent in ascertaining a third party's rights under the contract. For example, the Fifth Circuit stated, in the context of a contract between private parties:

> A third party beneficiary contract is only created if (1) the intent of the parties to the contract is clear that the promisor is assuming a direct obligation to the beneficiary; and (2) such intent is evidenced at the time that the contract is formed.

Trient Partners I Ltd., 83 F.3d at 713. Similarly, the Connecticut Supreme Court stated that "the ultimate test to be applied [in determining whether a person has a right of action as a third party beneficiary] is whether the [mutual] intent of the parties to the contract was

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the third party benefitted from the contract. *Id.* at 22 n.37 (citing *Lenz* v. *Chicago & N.W. Ry.*, 86 N.W. 607 (Wis. 1901)).

As explained in the text, see pp. 27-28, *supra*, Corbin finds no third-party beneficiary rights in the distinct situation where there is no such direct performance—where C (here, an irrigation district) is under a contractual obligation to A (a farmer) and C enters into a *separate contract* with B (the United States) to supply a commodity (water) to enable it to perform its obligation to A. Moreover, other commentators have noted that Professor Corbin's formulation does not adequately distinguish between contracts intended to give a third party the right to sue and contracts intended only to confer an indirect benefit. See Melvin A. Eisenberg, *Third-Party Benefciaries*, 92 Colum. L. Rev. 1358, 1381 (1992) ("the intent-to-benefit test * * * is difficult or impossible to apply in a meaningful and consistent way and * * * is essentially an empty test that asks a non-question"); Orna S. Paglin, *Criteria for Recognition of Third Party Beneficiaries' Rights*, 24 New Eng. L. Rev. 63, 70 (1989) ("Corbin's work overlooks the complications inherent in third party beneficiary contracts").

that the promisor should assume a direct obligation to the third party [beneficiary]." *Grigerik* v. *Sharpe*, 721 A.2d 526, 536 (Conn. 1998) (alteration in original, emphasis omitted, internal quotation marks omitted), cert. denied, 747 A.2d 2 (Conn. 2000).[11]

2. *Petitioners concede that the Westlands Contract does not grant them an express right to sue the United States*

Petitioners acknowledge that nothing in the Westlands Contract grants them an express right to sue to enforce the contract between Westlands and the United States. They argue only that third party beneficiary status is "implied in the language of the contract and the surrounding circumstances." See Pet. Br. 22 (capitalization altered); see also *id.* at 27, 36. That con-

[11] See *National Bd. of Examiners for Osteopathic Physicians & Surgeons, Inc.* v. *American Osteopathic Ass'n*, 645 N.E.2d 608, 618 (Ind. Ct. App. 1994) ("The intent necessary to the third-party's right to sue is not a desire or purpose to confer a particular benefit upon the third-party nor a desire to advance his interest or promote his welfare, but an intent that the promising party or parties shall assume a direct obligation to him."); *Laclede Inv. Corp.* v. *Kaiser*, 596 S.W.2d 36, 42 (Mo. Ct. App. 1980) ("The contract terms must clearly express that the contracting parties intended the third party to be the beneficiary of performance of the contract and have the right to maintain an action on the contract."); see also 17A Am. Jur. 2d *Contracts* § 432 (2001) ("the intent which must exist is not a desire or purpose to confer a particular benefit upon the third person, but an intent that the promisor should assume a direct obligation to him"); Comment Note, *Right of Third Person to Enforce Contract Between Others for His Benefit* 81 A.L.R. 1271, 1287 (1932) ('intent' is not a desire or purpose to confer a benefit upon the third person, nor a desire to advance his interests, but an intent that the promisor shall assume a direct obligation to him"); *Vikingstad* v. *Baggott*, 282 P.2d 824, 826 (Wash. 1955) (quoting 81 A.L.R. at 1287).

cession is significant because this Court has recognized, even in the context of private contracts, that the contracting parties' chosen language provides the best indication of the parties' intent to create third-party rights. See *United Steelworkers* v. *Rawson*, 495 U.S. 362, 375-376 (1990) ("If an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees.").

A fortiori, a contract between two governmental entities—in this case, the United States and a state water district—should not be construed to authorize private third parties to enforce the contract against the United States unless "the terms of the promise provide for such liability." Restatement (Second) Contracts, *supra*, § 313(2)(a). See *ibid.*, comment a ("Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested."). To hold otherwise would subject the United States to liability without any determination and expression, by Congress or the Executive Branch, of that intent. Furthermore, it would frustrate the irrigation district's core function of formulating and executing contracts as a single agency on behalf of the collective interest of the water users within its geographic boundaries.

In similar contexts, this Court has refused to recognize statutory private rights of action, whether against the government or other private parties, in the absence of an express legislative directive. See, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-284 (2002); *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 209 (2002); *Correctional Servs. Corp.* v.

Malesko, 534 U.S. 61 (2001); *Alexander* v. *Sandoval*, 532 U.S. 275 (2001); *FDIC* v. *Meyer*, 510 U.S. 471, 486 (1994); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979). And it has been especially reluctant to do so when the statute contemplates a contractual funding relationship between the United States and another entity and the plaintiff essentially sues as a third party beneficiary under that contract. *Gonzaga Univ.*, 536 U.S. at 279-282. The Court should thus be especially reluctant to recognize third-party contractual rights in the absence of express provision of such rights in the authorizing statute or within the four corners of the contract. See *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("courts are bound to interpret contracts in accordance with the expressed intentions of the parties"). There is every reason to expect that, if the contracting parties intended to create such rights, which would subject the United States to monetary liability even where the irrigation district has disavowed such a claim, and would undermine the irrigation district's authority to resolve or compromise contractual disputes on behalf of its constituents, the contracting parties would say so expressly. See Pet. App. 10a ("Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract *absent a clear intent to the contrary*." (quoting *Klamath*, 204 F.3d at 1211) (emphasis added and internal citations omitted in original)). That is particularly true in light of Congress's decision to move away from its prior practice of contracting directly with individual farmers.

Petitioners suggest otherwise, relying primarily on the Federal Circuit's decision in *H.F. Allen Orchards* v. *United States*, 749 F.2d 1571 (1984), cert. denied, 474

U.S. 818 (1985). See Pet. Br. 25-27, 37, 40, 41, 44, 46. They contend that the *Allen Orchards* decision shows that any irrigator is an intended third-party beneficiary of its irrigation district's reclamation contracts with the United States. But, contrary to petitioners' suggestion, *Allen Orchards* did not categorically hold that all irrigators using water from a reclamation project are intended third-party beneficiaries of a reclamation contract between the United States and the irrigation district. In fact, *Allen Orchards* did not involve a reclamation contract at all. Instead, the irrigators in that case claimed to be intended third-party beneficiaries of a "consent decree and subsequent alleged implied contracts." 749 F.2d at 1576.

Moreover, to the extent that *Allen Orchards* suggests that individual farmers should be viewed as intended third-party beneficiaries of reclamation contracts, the Ninth Circuit properly concluded that *Allen Orchards* is incorrect as a matter of contract law precisely because it fails to take account of the actual terms of the contract. Pet. App. 14a n.5. "That court did not * * * examine any contract language. Instead, it based its conclusion on the fact that the farmers were beneficial users of the water who ultimately paid for it." *Ibid.* The Ninth Circuit correctly concluded that "the mere fact that the farmers benefit from the [Westlands Contract] is not enough to confer intended-beneficiary status on them." *Ibid.* See pp. 29-31, *supra*.[15]

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[15] The Federal Circuit's decision is doubtful precedent in any event, because that court predicated its decision on the mistaken assumption that the irrigators in *Allen Orchards* held a property right under Washington state law to the water they put to beneficial use. 749 F.2d at 1576 (citing *Fox* v. *Ickes*, 137 F.2d 30 (D.C. Cir. 1943)). The Washington Supreme Court has since held that, under Washington law, recipients of federal reclamation water do

In sum, there is no warrant for creating contractual rights without regard to the express terms of the contract and in disregard of the statutory scheme authorizing the contract. Where, as here, a reclamation contract between two governmental entities makes no provision for third-party enforcement, the contract should not be construed to create third-party enforcement rights.

C. Neither The Westlands Contract Nor Any Extra-Contractual Source Impliedly Grants Petitioners The Right To Sue The United States For Breach Of The Westlands Contract

Even if this Court were to conclude that a reclamation contract between the United States and a state irrigation district could create "implied" third-party enforcement rights in some circumstances, no such implication is warranted here. Petitioners cite various provisions of the Westlands Contract (Pet. Br. 28-36), but those provisions indicate, at most, that the United States and Westlands understood that Westlands would in turn provide water to farmers. They do not

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not have an appropriative right to the water they use. See *Department of Ecology* v. *United States Bureau of Reclamation*, 827 P.2d 275, 281 (Wash. 1992). The California courts have reached the same conclusion with respect to California irrigators. See pp. 41-43, *infra*. Petitioners' reliance on *Henderson County Drainage District No. 3* v. *United States*, 53 Fed. Cl. 48 (2002), is similarly misplaced. See Pet. Br. 25, 27, 43-44. *Henderson* did not involve the Bureau of Reclamation, an irrigation district, federal reclamation law, or the delivery of water. The court in that case, without any consideration of the contract language, held that a drainage district could sue under a contract the district had negotiated with the Army Corps of Engineers because "the landowners would reasonably expect to be helped (or injured) by the [contract]." 53 Fed. Cl. at 52.

establish that the farmers would have the right to enforce the Westlands Contract against the United States. There is also no merit to petitioners' contentions that the "surrounding circumstances" of the Westlands Contract (*id.* at 36-46) and a prior stipulated judgment respecting that contract (*id.* at 46-49) provide a basis for recognizing third-party enforcement rights.

1. Article 15 of the Westlands Contract does not grant petitioners an implied right to sue the United States

Petitioners contend that Article 15 of the Westlands Contract "recognize[s] farmers' rights to use the water, strongly imply[ing] that the parties to the contract intended that performance would benefit the farmers." Pet. Br. 29. The implication that petitioners seek to draw from Article 15—that it confers enforceable rights against the United States—is unsound. Article 15 does not state that petitioners or other irrigators have a right under the Westlands Contract enforceable against the United States.[16] Rather, Article 15, captioned "ALL BENEFITS CONDITIONED UPON PAYMENT" (J.A. 45), simply recognizes that situations may arise in which Westlands is unable to collect payment from water users and may therefore be unable to meet

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[16] The relevant portion of Article 15 states (J.A. 45):

> [N]o water made available by the United States pursuant hereto shall be furnished for the benefit of any such lands or water users, except upon the payment by the landowner of his assessment or a toll charge for such water, notwithstanding the existence of any contract between the District and the owner or owners of such tract. Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract.

its contractual obligations to the United States. Article 15 makes clear that, in those situations, the water users must pay for the water as "a prerequisite to the right to the use of water furnished to the District" and that there is "no right to any water" for which payment is not made. *Ibid.*

Article 15 does not confer federal rights on water users. To the contrary, Article 15 protects the United States' interests by making clear that the United States is under no obligation to provide water to Westlands if Westlands has not received the money it needs to pay for the water. It does so by restricting *Westlands* from providing CVP water to the ultimate water users under its relationship with those water users unless the water users pay their assessments for that water. Thus, to the extent that Article 15 says anything about the water users' contractual rights, it indicates that those rights derive from the water users' relationship and state-law contracts with *Westlands*, not from Westlands' contract with the United States, and that Article 15 places federal *restrictions* on any such contracts. See J.A. 45 (the United States need not provide water for which payment is not made "notwithstanding the existence of any contract between the District and the owners or owners [of land in the District]"); *ibid.* ("Contracts, if any, between the District and the water users involving water furnished pursuant to this contract shall provide that such use shall be subject to the terms of this contract.").[17]

[17] Article 14, captioned "AGREED CHARGES A GENERAL OBLIGATION OF THE DISTRICT—TAXABLE LAND" (J.A. 45), reinforces that understanding. It states that "[t]he District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users." *Ibid.*

2. The other Westlands Contract provisions that petitioners cite do not grant petitioners an implied right to sue the United States

Petitioners contend that Articles 9(c), 11(b), and 11(c) collectively "recognize third persons have rights or remedies through or under the District" and "strongly imply" that petitioners are such third parties. Pet. Br. 31. The language of those provisions, however, does not support petitioners' characterization.

Article 9(c) provides, in relevant part, that the United States shall have the right to use "waste, seepage, and return-flow water" that derives from the United States' deliveries to Westlands and escapes or leaves Westlands' boundaries, but disclaims the United States' right to "water being used pursuant to this contract for surface irrigation or underground storage within the District's boundaries by the District or those claiming by, through, or under the District." J.A. 41. Article 11(b) provides that "there shall be made an adjustment on account of the amounts paid to the United States by the District for water for [a shortage] year" and that this adjustment "shall constitute the sol[e] remedy of the District or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein." J.A. 43. Article 11(c) allows Westlands to choose not to accept or pay for water exceeding 300 parts per million of chloride, but requires Westlands to pay for "any water actually furnished to and used by, through, or under the District for any purpose." J.A. 44.

Together, Articles 9(c), 11(b) and 11(c) show that the contracting parties understood that Westlands itself would not necessarily use the water that the United States delivers under the Westlands Contract. Those provisions neither say nor imply, however, that the ultimate water users would have any right to enforce the Westlands Contract. Those provisions merely set out standard limitations on the contracting parties' duties. They do not promise a benefit to a third party and do not evidence, even implicitly, an intent to give water users such as petitioners the right to enforce the contract. To the contrary, Article 11(b) makes clear that the United States' only contractual obligation is to Westlands and that the only remedy for a water shortage is an adjustment of Westlands' account. That provision clearly excludes the type of suit petitioners are asserting in this case: a suit by a third party to seek money damages against the United States for a water shortage.[18]

[18] There is no merit to petitioners' contention that Articles 2(b), 5, and 12 "confirm" that they are intended third-party beneficiaries. See Pet. Br. 32. Those provisions merely show that the United States and Westlands understood that most of the water delivered under the contract would be used to irrigate lands within Westlands' boundaries. They do not indicate that the water users would have the right to enforce the Westlands Contract. There is also no merit to petitioners' contentions (*id.* at 32-36) that the Westlands Contract's recitals—which state that the contract is made "in pursuance generally" of the federal reclamation laws (J.A. 30) and that Westlands acts "pursuant to" California law (*ibid.*)—give petitioners a right to enforce the Westlands Contract against the United States. Those standard recitals say nothing about third-party enforcement rights.

3. *The "surrounding circumstances" of the Westlands Contract do not imply that petitioners are entitled to sue the United States for breach of that contract*

Petitioners argue (Pet. Br. 36-46) that the "surrounding circumstances" of the Westlands Contact also provide a basis for inferring third-party enforcement rights. But the most immediate surrounding circumstance—the federal statutory framework that requires a contract with an irrigation district and eschews contracts with individual water users—strongly reinforces the conclusion, evident from the terms of the contract itself, that petitioners, as water users, have no individually enforceable contract rights against the United States.

Petitioners contend that they should have third-party enforcement rights because they "use," "pay" for, and "own" the water that the United States delivers to Westlands under the Westlands Contract. *Id.* at 37-43. The farmers (including petitioners) who use and pay for water delivered to Westlands pursuant to its contract with the United States do so pursuant to their own relationship with Westlands established by state law, subject to whatever limitations on that relationship federal law and the Westlands Contract may impose on that relationship. The Westlands Contract does not, for example, identify the particular persons who will use water under the contract, and it does not provide for the water users to receive water directly from the United States or for the water users to make payments directly to the United States. The fact that petitioners and other farmers use and pay for the water therefore does not suggest that the United States and Westlands intended to confer on them individual rights to enforce the Westlands Contract.

Petitioners' claim that they own the water or rights to the water used on their lands is equally unavailing in establishing that they are third-party beneficiaries under the Westlands Contract. Whatever the significance of concepts of equitable and legal title, ownership, and similar property or quasi-property rights in other settings—e.g., where a water user sues to enforce what he alleges to be *property* rights in water, see, e.g., *Ickes* v. *Fox*, 300 U.S. 82 (1937), they have no bearing on the question of *contract* law at issue here. As explained above, insofar as *contract* rights are concerned, the reclamation laws provide for the United States to contract only with irrigation districts, rejecting a prior regime in which the United States entered into contractual arrangements directly with water users, and the particular contract at issue here with the Westlands District manifests no intent to depart from that framework by conferring privately enforceable contract rights on individual water users.

Moreover, insofar as claims of entitlement to project water are concerned, Congress has specified that the question of who holds the rights to water from a federal reclamation project is a matter of state law. See 43 U.S.C. 383; *California* v. *United States*, 438 U.S. 645, 665, 675 (1978). California has made clear that the United States, and not the individual water users who receive project water, holds the right to the CVP water that the Bureau delivers to Westlands.

The California Water Code provides that a party can acquire an appropriative water right only by obtaining a state water permit. Cal. Water Code Ann. § 1225 (West 1971). The Bureau of Reclamation, and not petitioners, holds the state permits for the water that the United States delivers to Westlands under the Westlands Contract. WER 232-233. Accordingly, California

courts and the California State Water Resources Control Board have determined that the Bureau, not the irrigation districts or the water users, hold the water rights to CVP water. *County of San Joaquin* v. *State Water Res. Control Bd.*, 63 Cal. Rptr. 2d 277, 285 n.12 (Ct. App. 1997) ("The Bureau has appropriative water rights in the Central Valley Project."); *Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, Revised Decision 1641, at 129 (Cal. St. Water Res. Control Bd. 2000) (the United States "is the water right holder") (available at (www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf). See *Israel* v. *Morton*, 549 F.2d 128, 132 (9th Cir. 1977) (holding that end users of water delivered by a federal reclamation project do not acquire appropriative rights in the water that would transcend contractual terms).

Petitioners nevertheless contend (Br. 33, 37) that they must hold the rights to water they use to irrigate their lands, because federal reclamation law incorporates the state law concepts of appurtenancy and beneficial use. 43 U.S.C. 372 ("The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."). But, as the California State Water Resources Control Board has explained, the requirements of appurtenancy and beneficial use do not mean that the owner of the land to which the water use is appurtenant or the person who puts the water to beneficial use holds the water right. Revised Decision 1641, *supra*, at 128. Thus, one who appropriates water from its natural course and rents or sells it to others can acquire an appropriative water right. *See, e.g., Joerger* v. *Pacific Gas & Elec.*, 276 P. 1017, 1029 (Cal. 1929).

Petitioners erroneously invoke decisions of this Court for the proposition that they must have enforceable rights under the Westlands Contract because, they assert, they and other individual water users hold water rights under California law. See Pet. Br. 21, 25, 37-40, discussing *Ickes* v. *Fox*, *supra*; *Nebraska* v. *Wyoming*, 325 U.S. 589, 611-616 (1945); *California* v. *United States*, *supra*; and *Nevada* v. *United States*, 463 U.S. 110, 121-126 (1983). None of those cases involved contract claims against the United States or claims by water users to have enforceable contractual rights as third-party beneficiaries under a contract between the United States and an irrigation district. They accordingly do not support petitioners' position here.

Moreover, the California State Water Resources Control Board and California courts definitively interpret California water law, and they have determined that it is the United States that holds the rights to the water it delivers to Westlands under the Westlands Contract. None of the decisions of this Court on which petitioners rely interpreted California law. See *Nevada* v. *United States*, *supra* (Nevada law); *Nebraska* v. *Wyoming*, *supra* (Nebraska and Wyoming law); *Ickes* v. *Fox*, *supra* (Washington law). And *California* v. *United States*, *supra*, held that the United States must comply with California water law in operating the CVP, but said nothing about who holds water rights to CVP water under California law.[19]

[19] Petitioners' contention (Pet. Br. 43) that they are entitled to enforce the Westlands Contract because they "reasonably relied" on the contracting parties' supposed intent to benefit them is without merit because, for the reasons already stated, the Westlands Contract was not intended to provide direct benefits to petitioners and petitioners' reliance, reasonable or otherwise, is not sufficient to create third-party enforcement rights. See pp. 27-28, *supra*.

4. The 1986 Judgment does not give petitioners a right to sue the United States for breach of the Westlands Contract

Petitioners contend (Pet. Br. 46-48) that the 1986 Judgment, entered pursuant to stipulation in *Barcellos* (see pp. 8-9, *supra*), shows that they are intended beneficiaries of the Westlands' Contract. The 1986 Judgment was entered 23 years after the Westlands Contract and, therefore, is not probative of the United States' and Westlands' intent at the time they entered into the Westlands Contract. See, *e.g.*, *Trient Partners*, 83 F.3d at 713; *Corrugated Paper Products, Inc.* v. *Longview Fibre Co.*, 868 F.2d 908, 913 (7th Cir. 1989). In any event, even if the 1986 Judgment provided

Petitioners' further contention that Westlands is their "surrogate" (*id.* at 44) is incorrect. Westlands represents the water users collectively as a limited-purpose governmental entity, not as a surrogate for individual water users.

Even if petitioners were correct in comparing an irrigation district to a private fiduciary for each individual water user (*id.* at 45 n.53), that state-law characterization of the relationship between Westlands and individual water users could not confer on water users a federal right to sue as third-party beneficiaries to enforce a contract between the United States and Westlands that does not itself confer such a right. And, in any event, petitioners would not have unconditional third-party enforcement rights. A trustee has the exclusive authority to sue parties who injure the beneficiaries' interest in the trust, and a trust beneficiary can sue to enforce a contract entered into on its behalf by the trustee only if the trustee "improperly refuses or neglects to bring an action against the third person." *Chauffeurs, Teamsters & Helpers, Local No. 391* v. *Terry*, 494 U.S. 558, 567-568 (1990) (citing 4 William Fratcher, *Scott on Law of Trusts* § 282, at 25-29 (4th ed. 1987), and quoting Restatement (Second) of Trusts § 282(2) (1959)). Petitioners have never attempted to prove in the course of this litigation that they can satisfy that requirement—that is, that Westlands acted improperly by dismissing its complaint against the United States.

evidence of the United States' and Westlands' intent in 1963, the language of that judgment does not support petitioners' characterization.

Petitioners first invoke (Pet. Br. 46-47) Paragraph 4.2 of the 1986 Judgment, in which Westlands "acknowledges that it entered into the [Westlands Contract] for the benefit of the [original Westlands areas] and the lands therein." J.A. 111. But Paragraph 4.2 goes on to identify Westlands ("The District")—and not petitioners —as the party that will enforce "the prior rights of said areas" under the Westlands Contract. *Ibid.* Paragraph 4.2 says nothing about whether the United States and Westlands intended to confer on petitioners any enforcement rights under the Westlands Contract. Thus, Paragraph 4.2 provides no support for petitioners' claim of third-party rights.

Petitioners also rely (Pet. Br. 47) on Paragraph 3 of the 1986 Judgment, which in relevant part preserves the right of any party to the stipulation to seek "appropriate relief * * * against the Federal parties by the filing of a new action for violation of * * * any contract or other right or obligation arising independently of this Judgment." J.A. 110. That language, by its terms, allows petitioners only to enforce whatever unspecified rights already exist "independently" of the 1986 Judgment. It does not grant any new rights or confirm the existence of any specific existing rights. Thus, Paragraph 3 sheds no light on whether petitioners have any third-party enforcement rights.[20]

[20] Petitioners' discussion of Paragraph 23 of the 1986 Judgment (see Pet. Br. 46-47) is likewise beside the point. Paragraph 23 provides: "Neither this Judgment nor the Stipulation for Compromise Settlement is a contract or an amendment to a contract with the United States as described in Section 203(a) of the 1982 Act." J.A. 146. It says nothing about whether petitioners are intended third-party beneficiaries of the Westlands Contract.

5. The 1986 Judgment has no claim-preclusive or issue-preclusive effect on the matters before this Court

Petitioners further argue (Pet. Br. 48-49) that the 1986 Judgment in *Barcellos* precludes the United States from contesting that petitioners are entitled to enforce the Westlands Contract. They are mistaken.

First, petitioners waived that argument by failing to present it to the district court, which dismissed their suit. See *Arizona* v. *California*, 530 U.S. 392, 408-413 (2000); see also *Broad* v. *Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996). Petitioners contended in the district court that the court could adjudicate their third-party enforcement action under the waiver of sovereign immunity contained in Section 390uu. 43 U.S.C. 390uu. They did not argue that the 1986 Judgment precluded the district court from examining whether they had third-party rights or whether Section 390uu's waiver of sovereign immunity applied. Petitioners' "failure to raise the preclusion argument earlier in the litigation, despite ample opportunity and cause to do so," forecloses them from raising it now. *Arizona*, 530 U.S. at 413.

Second, even if petitioners preserved that argument for appeal, the 1986 Judgment cannot have any claim-preclusive effect in this case because the claim that Judgment resolved in *Barcellos*, arising from the Secretary's subsequently rescinded 1978 decision to require new water service contracts, differed from petitioners' claim in this case, which arises from reductions of water deliveries on account of CVPIA and ESA requirements. See *Arizona* v. *California* 530 U.S. at 414; *First Pac.*

Bancorp v. *Helfer*, 224 F.3d 1117, 1128 (9th Cir. 2000). Additionally, the 1986 Judgment does not have any relevant issue-preclusive effect because the parties resolved the *Barcellos* claims by stipulation and voluntary dismissal without reaching the merits of the parties' competing contentions. AER 242-297. As a general matter, consent judgments have collateral estoppel effect only to the extent that "the parties intend their agreement to have such an effect." *Arizona* v. *California*, 530 U.S. at 414. See, *e.g.*, *Franco* v. *Selective Ins. Co.*, 184 F.3d 4, 9 (1st Cir. 1999); *La Preferida, Inc.* v. *Cerveceria Modelo*, 914 F.2d 900, 907 (7th Cir. 1990); 18 Charles Wright, Arthur Miller & Edward Cooper, *Federal Practice & Procedure* § 4443, at 251-253 (2d ed. 2002). The 1986 Judgment does not contain any such indication and therefore carries no issue-preclusive effect that is relevant here.

Third, even if petitioners had not waived their preclusion argument, and even if the *Barcellos* litigation had concluded with a judgment on the merits, the *Barcellos* court's interlocutory ruling that it could exercise jurisdiction, 491 F. Supp. at 264-267, would not preclude the district court in this case from considering whether it had jurisdiction over petitioners' claims for alleged breaches of the Westlands Contract.[21] A court's resolution of an issue does not preclude litigation of a later contention unless "the issue decided in the prior adjudication is substantially identical to the issue in the

[21] The *Barcellos* court's April 1980 order denying the federal defendants' motion to dismiss for lack of jurisdiction likewise cannot have preclusive effect because it was merely an interlocutory order that did not result in a final adjudication of the issue. See *Catlin* v. *United States*, 324 U.S. 229, 236 (1945) (holding that the denial of a claim of lack of jurisdiction is a nonappealable interlocutory order).

subsequent action." *Durkin* v. *Shea & Gould*, 92 F.3d 1510, 1516 (9th Cir. 1996).

In *Barcellos*, the district court held that it had jurisdiction on either of two alternate grounds: (1) that the plaintiffs were challenging ultra vires agency action, 491 F. Supp. at 265-266 (citing *Dugan* v. *Rank*, 372 U.S. 609, 621-622 (1963)), and (2) that the plaintiffs were seeking an adjudication of water rights under the McCarran Amendment, 43 U.S.C. 666(a), 491 F. Supp. at 266-267 (citing *Dugan*, 372 U.S. at 617). In the instant case, by contrast, petitioners asserted that the court had jurisdiction over their third-party enforcement action under the Westlands Contract pursuant to Section 221 of the Reclamation Reform Act of 1982, 43 U.S.C. 390uu. WER 200, 209. Petitioners challenge the district court's rejection of that contention (WER 327-336). The jurisdictional ruling in *Barcellos* and the jurisdictional ruling in this case, which rest on entirely different statutory provisions, do not involve "substantially identical" issues. Indeed, as the district court correctly noted in its June 1998 opinion (WER 201), the statutory provision at issue in the instant case—Section 390uu—was not enacted until 1982, two years after the jurisdictional ruling in *Barcellos*.

Petitioners argue (Pet. Br. 49) that the United States should have objected when individual farmers sought to enforce the 1986 Judgment in subsequent actions. Petitioner overlooks that those actions sought enforcement of the 1986 Judgment. See *Barcellos & Wolfsen, Inc.* v. *Westlands Water Dist.*, 899 F.2d 814 (9th Cir. 1990); *Barcellos & Wolfsen, Inc.* v. *Westlands Water Dist.*, 849 F. Supp. 717 (E.D. Cal. 1993), aff'd, *O'Neill* v. *United States*, 50 F.3d 677 (9th Cir. 1995), cert. denied, 516 U.S. 1028. This case, unlike those suits, is a new

and distinct action that seeks to enforce the Westlands Contract based on non-existent third-party rights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ADDENDUM

Statutory Provisions Involved

1. Section 46 of the Act of May 25, 1926, ch. 383, 44 Stat. 649, as amended, states:

> No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the

Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided, however*, That if excess land is acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, by inheritance, or by devise, water therefor may be furnished temporarily for a period not exceeding five years from the effective date of such acquisition, delivery of water thereafter ceasing until the transfer thereof to a landowner duly qualified to secure water therefor: *Provided further*, That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for

the first year after such public notice shall be transferred to and paid as a part of the construction payment.

43 U.S.C. 423e.

2. Section 221 of the Reclamation Reform Act of 1982, Pub. L. No. 97-293, Tit. II, 96 Stat. 1271, states:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved is situated.

43 U.S.C. 390uu.

No. 03-1566

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IN THE

Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents,

WESTLANDS WATER DISTRICT,
Plaintiff Intervenor-Respondent,

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Defendant Intervenors-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether recipients of reclamation water may bring a suit for damages in federal district court against the United States, based on the Bureau of Reclamation's alleged breach of a reclamation contract to which the water recipients are not parties.

STATUTORY PROVISIONS INVOLVED

The sovereign immunity waiver section of the Reclamation Reform Act of 1982, 43 U.S.C. §390uu, is reprinted in Pet. App. 47a.

LIST OF PARTIES

The plaintiffs and appellants below, petitioners here, are Francis A. Orff; Brooks Farms II; Brooks Farms IV; Brooks Farms V; G.S. Farms; Five-D Westside Farms, Inc.; R&S Farming; Cardella Ranch; Gramis Family Farms II; Edwin R. O'Neill, BRO Partnership; BTO Partnership; EJC Partnership; ERO Partnership; JEO Partnership; SLO Partnership; TBO Partnership; C.S. Stefanopoulos Trust; Elena Stefanopoulos Trust; Estate of Elena Stefanopoulos; D.D. Stefanopoulos Trust; Pagona Stefanopoulos; Sumner Peck Ranch, Inc.; Y. Stephen Pilibos; and Pilibos Children's Trust.

The defendants and appellees below, respondents here, are United States of America; United States Department of the Interior; Bureau of Reclamation; Fish and Wildlife Service; United States Department of Commerce; National Marine Fisheries Service; Ronald H. Brown, Secretary of Commerce; and Bruce Babbitt, Secretary of Interior.

Parties who intervened below as defendants and appellees, also respondents here, are Natural Resources Defense Council; United Anglers of California; Save San Francisco Bay Association; Sierra Club; Bay Institute of San Francisco; Environmental Defense Fund; California Striped Bass Association; Trout Unlimited of California; Sacramento River Council; California Sportfishing Protection Alliance; Pacific Coast Federation of Fisherman's Associations; and The Wilderness Society.

Westlands Water District, respondent here, intervened in the Court of Appeals as an appellant.

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Joseph Sax, *Federal Reclamation Law* in 2 Water & Water Rights (R. Clark ed. 1967)	3, 28, 48
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Paul S. Taylor, *Excess Land Law: Calculated Circumvention*, 52 Cal. L. Rev. 978 (1964)	3, 4
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IN THE

Supreme Court of the United States

No. 03-1566

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents,

WESTLANDS WATER DISTRICT,
Plaintiff Intervenor-Respondent,

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Defendant Intervenors-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR INTERVENORS–RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, *et al.*

STATEMENT OF THE CASE

1. This case presents the latest effort by recipients of federally-subsidized reclamation water in California to challenge the United States Bureau of Reclamation's ("Bureau's") compliance with its statutory and contractual obligations in administering the Central Valley Project ("CVP"). Petitioners own or operate agricultural lands within the West-

lands Water District ("District"). In 1963, the Bureau and the District entered into a 40-year contract for the delivery of CVP water to the District, which in turn delivers water to petitioners and other end-users. In the early 1990s, the Bureau reduced the amount of water delivered, to comply with the Endangered Species Act ("ESA"), 16 U.S.C. §§1531 *et seq.*, and the Central Valley Project Improvement Act ("CVPIA"), Pub. L. No. 102-575, 106 Stat. 4706. Petitioners challenged that reduction in previous litigation, which was resolved by the Ninth Circuit's holding that Art. 11(a) of the 1963 contract "absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate." *O'Neill v. United States*, 50 F.3d 677, 689 (9th Cir.), *cert. denied*, 516 U.S. 1028 (1995). Petitioners nonetheless reassert their contract construction claims in this case, alleging standing as third-party beneficiaries under the 1963 contract to hold the United States liable for more than $32 million in consequential damages, including lost crop profits.

2. *The statutory framework.* The 1963 contract between the District and the Bureau was executed pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, as amended. *See* 1963 Contract Preamble at Joint Appendix ("JA") 30. "In that Act, Congress set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States." *California v. United States*, 438 U.S. 645, 650 (1978). The purposes of the federal reclamation program are diverse, and include promoting navigation, protecting fisheries and water quality, preventing land monopoly and speculation in the West, and ensuring "the orderly development of the West" through development of an agrarian society of family-owned farms.[1]

[1] *See* Act of August 26, 1937, ch. 832, §2, 50 Stat. 844, 850; CVPIA, Pub. L. No. 102-575, §3406(a), 106 Stat. 4706, 4714; *Peterson v. Dep't of Interior*, 899 F.2d 799, 802-04 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990); Joseph Sax, *Federal Reclamation Law*, §120.1 at 210 *in* 2 Water & Water Rights 210 (R. Clark ed. 1967) ("*Federal Reclamation Law*"); Paul S. Taylor, *Excess Land Law: Calculated Circumvention*, 52 Cal. L. Rev. 978, 979 (1964) ("*Calculated Circumvention*"); Paul S. Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 Yale L.J. 477, 477 (1955) ("*Public Policy*").

The 1902 Reclamation Act includes several provisions that promote these goals. The "proviso" to Section 8 of the 1902 Act specifies that water rights are to be "appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of that right." Reclamation Act of 1902, ch. 1093, §8, 32 Stat. 388, 390, 43 U.S.C. §372, 383. This provision ties "the water to the land" to "prevent[] speculation in water rights" by those receiving subsidized reclamation water. Sax, *Federal Reclamation Law*, at 210; *see also* Taylor, *Public Policy*, 64 Yale L.J. at 486 ("tying water and land together in common ownership [was] among the surest of anti-monopoly devices"). The "excess land" provision, which provided that "[n]o right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner," Reclamation Act 1902, ch. 1093, §5, 32 Stat. 388, 389, 43 U.S.C. §431, "limit[ed] the quantity of land in a single ownership to which project water might be supplied" to ensure that "the benefits [of the reclamation program will] be made available to the largest number of people, consistent, of course, with the public good." *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 292 (1958); *see* Taylor, *Public Policy*, 64 Yale L.J. at 486; Joseph Sax, *Problems of Federalism in Reclamation Law*, 37 U. Colo. L. Rev. 49, 67 (1964). Congress subsequently required reclamation water users who owned land in excess of 160 acres to execute "recordable contracts" with the Secretary of the Interior to sell their excess lands within 10 years. Omnibus Adjustment Act of 1926, ch. 383, §46, 44 Stat. 636, 649, 43 U.S.C. §423e. And in 1982, Congress enacted the Reclamation

Reform Act which, among other things, increased the acreage limitation but required that water for excess lands be sold at "full cost." Pub. L. No. 97-293, §§201, 203-08, 96 Stat. 1261, 1263-67, 43 U.S.C. §§390aa, 390cc-390hh.[2]

3. *The 1963 Contract.* In 1937, Congress authorized the construction of the Central Valley Project ("CVP"), the nation's largest reclamation project, which redistributes fresh water resources throughout California's 400 mile-long Central Valley for the purposes of

> improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof . . . for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy.

Act of August 26, 1937, ch. 832, §2, 50 Stat. 844, 850; *see Westlands Water Dist. v. United States*, 337 F.3d 1092, 1095 (9th Cir. 2003). Subsequent legislation authorized construction of the San Luis Unit of the CVP, Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156, which became the source of reclamation water for the District and other water agencies. JA 30.

In 1963, the United States and the District entered into a long-term contract for the delivery of a "supplemental water

[2] The highly-subsidized price of reclamation water reflects "but a small fraction of the total cost of the project." *Ivanhoe*, 357 U.S. at 283; Taylor, *Calculated Circumvention*, 52 Cal. L. Rev. at 979. In the late 1980s, the government calculated that "the average [then-] present value of the irrigation subsidy for recipients of water from the Central Valley Project" was $1,850 per acre. *Peterson*, 899 F.2d at 805-06. A recent study by the Environmental Working Group calculated, based on estimated replacement costs of water, that recipients of CVP water obtain a subsidy of $416 million per year. Dean E. Murphy, *Water Contract Renewals Stir Debate Between Environmentalists and Farmers in California*, N.Y. Times, Dec. 15, 2004, at A15.

supply" to the District for such purposes as "irrigation, municipal, domestic, and other beneficial uses." Preamble at JA 30-31. The Bureau agreed to furnish that supplemental water from the San Luis Unit, when available, pursuant to an annual schedule for delivery and subject to a contractual maximum amount; and the District agreed to accept and pay for the delivered water at $7.50 per acre-foot plus $0.50 for drainage service. Arts. 3, 6 at JA 34-36, 38-39. The 1963 contract, which was for 40 years from the "initial delivery date," expires in 2007. Art. 2 at JA 33; JA 109.

Recognizing the variability of river flows and the competing demands on water resources, federal reclamation contracts limit the liability of the United States in the event of reduced water deliveries. The 1963 contract limits the United States' liability in several respects. Article 11 provides that upon "a shortage [of water] from any cause, the United States [may] apportion the available water supply among the District and others entitled under the then existing contracts to receive water from the San Luis Unit." Art. 11 at JA 42. The amount and manner of such apportionments are subject to the "conclusive determinations of the Contracting Officer" (defined as "the Secretary of the United States Department of the Interior or his duly authorized representative"). Arts. 11(a), 1(a) at JA 32, 43. The "sole remedy" for any dispute over apportionment is an "adjustment" of the payments made by the District. Arts. 7, 11(b) at JA 39, 43. Article 11(a) also explicitly limits liability, stating that "in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes." Art. 11(a) at JA 42. Further, Article 9(c) states: "The United States shall not be responsible for . . . claim of damage of any nature whatsoever . . . arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such water beyond such delivery points," Art. 9(c) at JA 40-41, thus insulating the United

States from damages claims arising after the Bureau provides contract water to the District at the designated delivery points. In addition, the contract reserves the United States' right to amend the reclamation laws, *see* Art. 26 at JA 53, making clear that the 1963 contract, which "was executed pursuant to the 1902 Reclamation Act and all acts amendatory or supplementary thereto," "'remain[s] subject to subsequent legislation' [enacted by the United States as] sovereign." *O'Neill*, 50 F.3d at 686 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982)).

4. *Prior litigation over the 1963 Contract.* Federal law prohibits the Bureau from delivering any reclamation water until it has executed a contract for payment from the receiving water district. 43 U.S.C. §485h(d), (e). The Bureau may enter into either a "repayment contract" under §9(d) of the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187, requiring the district to repay its share of project costs exclusive of interest, 43 U.S.C. §485h(d); *Ivanhoe*, 357 U.S. at 286, or a "water service" contract under the "more liberal provisions of §9(e) of [the] Act," *id.*, charging the district rates that, in the judgment of the Secretary of Interior, will "cover an appropriate share" of project costs, exclusive of interest. 43 U.S.C. §485h(e). The 1963 contract is a "water service" contract. Westlands Water District—Legal Questions, Sol. Op. M-36901, 85 Interior Dec. 297, 317 (1978).

In 1979, landowners within the original geographic boundaries of the District ("Area I") filed a California state court action against the District, contending that they were entitled to higher water priorities than the landowners that joined the District pursuant to a 1965 merger. *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 491 F. Supp. 263, 265 (E.D. Cal. 1980) ("*Barcellos I*"). The Area I landowners also sued those allegedly "junior" water users, but did not sue the Bureau, which the District joined as an indispensable party after removing the case to federal court. *Id.*

The *Barcellos I* litigation was resolved by stipulated judgment in 1986. JA 101-47. The judgment characterized the 1963 Contract as "a valid, enforceable and implementable contract entitling the District through the end of 2007 to water and other service . . . as specified therein." JA 111. The stipulated judgment also contained an enforcement clause, allowing the parties to "obtain relief from a violation of this Judgment" by filing a motion or a new action "for the sole purpose of seeking an order directing the Federal parties to perform in accordance with the express terms of this Judgment." JA 109-10.

In 1982 and 1987, Congress amended the reclamation laws to limit the availability of federally-subsidized reclamation water to large-scale operations and landowners, requiring among other things that certain lands held in excess of the acreage limitation be charged the full-cost rate for water, rather than the subsidized price. *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 817-19 (9th Cir.), *cert. denied*, 498 U.S. 998 (1990) ("*Barcellos II*"). Area I landowners challenged that legislation through a motion to enforce the *Barcellos I* stipulated judgment, asserting a right to pay only $8 per acre-foot for water on their excess lands (including lands not disposed of within the period required by their recordable contracts) rather than the full-cost rate ($42 per acre-foot). *Id.* at 819-21. The Ninth Circuit affirmed the district court's denial of the landowners' motion for specific performance (they sought no damages), concluding that the landowners did not possess the contract rights they claimed. *Id.* at 825.

By the early 1990s, more than a half century of massive federal and state water diversions had placed the Central Valley's natural environment under considerable stress. *See, e.g., NRDC v. Houston*, 146 F.3d 1118, 1124 (9th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999); *Westlands Water Dist. v. NRDC*, 43 F.3d 457, 459 (9th Cir. 1994). In 1992, Congress

passed and President Bush signed into law the CVPIA, which amended the reclamation laws by requiring the Secretary of Interior to comply with the ESA in operating the CVP and to take other measures to protect fish, wildlife, and habitat. CVPIA, Pub. L. No. 102-575, §§3406(b), 3408(g), 106 Stat. 4706, 4714, 4729. Among the CVPIA's purposes were to "protect, restore, and enhance fish, wildlife, and associated habitat in the Central Valley," to "address impacts of the Central Valley Project on fish, wildlife, and associated habitats," and to restore "balance" among agricultural, urban, and environmental water demands on the CVP. *Id.* at §3402, 106 Stat. 4706. The CVPIA amended the CVP's initial authorizing statute (which had required the dams and reservoirs on the San Joaquin River to "be used, first, for river regulation, improvement of navigation, and flood control," Act of August 26, 1937, ch. 832, §2, 50 Stat. 844, 850; *see also United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 135 (1986)), to include protection and restoration of fish and wildlife as a major purpose of the Project. *See* CVPIA, Pub. L. No. 102-575, §3406(a), 106 Stat. 4706, 4714.

Congress in the CVPIA instructed the Secretary "immediately upon enactment of this title, [to] operate the Central Valley Project to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act," to "dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title," and to furnish "firm water supplies of suitable quality to maintain and improve wetland habitat" in designated areas within the California Central Valley, including in the National Wildlife Refuge System. CVPIA, Pub. L. No. 102-575, §3406(b), 106 Stat. 4717; *id.* at §3406(b)(2), 106 Stat. 4715; *id.* at §3406(d), 106 Stat. 4722. The CVPIA also established a Restoration Fund, funded by a general surcharge on

all CVP water, to restore, improve and acquire habitat. *Id.* at §3407, 106 Stat. 4726.

In 1990, the National Marine Fisheries Service ("NMFS") listed the Sacramento River winter-run Chinook salmon as a threatened species under the ESA. *See* 50 C.F.R. §227.4 (1993). In 1993, the United States Fish and Wildlife Service ("USFWS") listed the delta smelt as a threatened species. *See* 50 C.F.R. §17.11 (1993). The NMFS and the USFWS subsequently concluded that the Bureau's manner of operating the CVP, and in particular, its use of pumps to withdraw water from the fragile Sacramento-San Joaquin Delta for transport to certain contracting districts, jeopardized the continued existence of those threatened species, but that the jeopardy could be reduced by altering CVP operations. *See O'Neill*, 50 F.3d at 681.

Pursuant to the CVPIA and in response to the ESA listing of winter-run chinook salmon and delta smelt, the Bureau in 1993 imposed operating restrictions on the pumps delivering water south of the Sacramento-San Joaquin Delta, effectively reducing the amount of water available for delivery to the District.[3] Petitioners initially challenged those water reductions through a motion to enforce the 1986 *Barcellos I* stipulated judgment. *See O'Neill*, 50 F.3d at 681. The district court and Ninth Circuit rejected those challenges, concluding that Art. 11(a) of the 1963 contract, which provides that the government shall not be liable "for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or *any other causes,*" JA 42 (emphasis

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[3] *See Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 720-21 (E.D. Cal. 1993), *aff'd sub nom.*, *O'Neill*, 50 F.3d 677; Dist. Ct. Docket No. 73 (Nov. 8, 1993), Request for Judicial Notice by Intervenors Friant Water Users Authority *et al.* ("*RJN*") Ex. 4(a) at 614 (Bureau of Reclamation, *Central Valley Project Water Supply for 1993* (Feb. 15, 1993)); *id.*, *RJN* Ex. 4(c) at 624 (Bureau of Reclamation, *Central Valley Project Water Supply for 1993* (April 7, 1993)).

added), "unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate," such as the ESA and CVPIA. *O'Neill*, 50 F.3d at 689; *id.* at 683 ("'any other causes' broadly and unambiguously contemplates the effects of subsequent Congressional mandates").

5. *The proceedings below.* At the same time the Area I landowners were challenging the Bureau's water reduction in *O'Neill*, the District was separately challenging that reduction in the present litigation. Initially, the District asserted mainly statutory claims under the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.*, and the ESA. Ninth Cir. Docket (June 25, 2001), Westlands Excerpts of Record ("WER") at 11-15; *see also O'Neill*, 50 F.3d at 688. Various groups intervened, including petitioners in this case, as plaintiffs, and respondents Natural Resources Defense Council and several fishing and other conservation organizations (collectively "NRDC"), as defendants. Pet. App. 4a, 25a.

In December 1994, the United States, the State of California, the District, and a broad array of other entities affected by the diversion of reclamation water from the San Francisco Bay and Sacramento Delta region negotiated the comprehensive "Principles for Agreement on Bay-Delta Standards Between the State of California and Federal Government" ("Delta Accord"). Dist. Ct. Docket No. 435 (May 5, 1995), Status Conf. Statement at 3. In light of the Delta Accord, all parties except petitioners stipulated to the dismissal of the District's complaint.[4]

Petitioners' complaint, amended after the district court's dismissal, alleged, *inter alia*, that the Bureau's reduction in water allocations to the District in 1993-94 and 1994-95 and

[4] *Id.*; Dist. Ct. Docket No. 439 (May 23, 1995), Stip. and Order.; Dist. Ct. Docket No. 438 (May 23, 1995), Order After Scheduling Conf.; *see also* Dist. Ct. Docket Nos. 442, 440, 452, 464.

its imposition of taxes and assessments to pay increased charges under CVPIA §3407 for the Restoration Fund violated the quantity and price terms of the 1963 contract. WER 31-84. Petitioners sought consequential contract damages exceeding $32 million and alleged that the United States had waived sovereign immunity in the Reclamation Reform Act, 43 U.S.C. §390uu, and the McCarran Amendment, 43 U.S.C. §666. WER 34, 71, 80.

All of petitioners' claims except for breach of the 1963 contract were subsequently either abandoned as moot, dismissed for lack of subject matter jurisdiction, or rejected on summary judgment. Pet. App. 4a-5a, 21a-22a. When the district court indicated that its pending judgment would bind the District as well as petitioners, the District moved to intervene, emphasizing the parties' differing views of the 1963 contract:

> The potential for practical impairment of Westlands' interests if intervention is not granted is self-evident. Moreover, Westlands' position with respect to the 1963 Contract, the 1965 Contract and the *Barcellos* Judgment is different from—and broader than—that of the Area I Intervenors. As this Court is aware, the differences between Westlands and the Area I intervenors have erupted into disputes and litigation in the past. In short, the Area I Intervenors do *not* represent the interests of Westlands, much less "adequately" represent Westlands' interests for purposes of intervention analysis.

Dist. Ct. Docket No. 596 (Aug. 13, 1998), Mem. of Ps & As in Support of Intervention, at 1. The district court subsequently deleted its reference to binding the District, noting that petitioners "disagree with Westlands on some issues in this litigation" and "that Area I and Westlands have differing interests." WER 305.

The Bureau moved for reconsideration of the district court's merits ruling on the ground that the United States had

not waived sovereign immunity to be sued for damages by non-parties to the 1963 contract. The district court agreed in light of *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), *cert. denied*, 531 U.S. 812 (2000), and ruled that petitioners were not intended beneficiaries of the 1963 contract because that contract evidenced no "intent to create in water users direct enforcement rights against the United States." Pet. App. 33a.

The district court rejected petitioners' argument that their independently-executed recordable contracts entitled them to enforce the 1963 contract. *Id.* at 34a-37a. The court also rejected petitioners' reliance upon *Barcellos I*, holding that it did not authorize a claim for money damages and that §390uu did not waive the government's immunity from suit under the stipulated judgment. *Id.* at 39a, 42a, 45a. Although the district court on three occasions invited petitioners to transfer their jurisdictionally-barred damages claims to the Court of Claims, petitioners declined each offer. *Id.* at 22a, 46a. The court then granted judgment to the government and respondent organizations. *Id.* at 22a.

On petitioners' appeal,[5] the Ninth Circuit affirmed on the ground that the government had not waived its sovereign immunity. *Id.* at 2a. As a threshold matter, the court rejected petitioners' argument that the government was claim- or issue-precluded from asserting a sovereign immunity defense. *Id.* at 6a-7a. The court also rejected petitioners' reliance on the McCarran Amendment, which waives sovereign immunity for general adjudications of the rights of *all* claimants on a stream. *Id.* at 7a. Finally, the court agreed that §390uu did not authorize district court jurisdiction because petitioners were not "contracting entities" entitled to sue the United

[5] The District intervened to support the government's argument that the court lacked jurisdiction because sovereign immunity had not been waived. *See* Ninth Cir. Docket (June 25, 2001), Westlands Opening Br. at 2.

States. *Id.* at 9a, 17a. Given the jurisdictional basis of its holdings, the Ninth Circuit vacated the district court's merits rulings against petitioners. *Id.* at 18a.

SUMMARY OF ARGUMENT

Although the underlying policy disputes among CVP water users and providers are weighty, the issues before this Court raise narrow questions of sovereign immunity and third-party standing. Two independent grounds support the judgment below.

First, the United States has not waived sovereign immunity under the Reclamation Reform Act of 1982, 43 U.S.C. §390uu. That statute does not allow district court actions for money damages against the United States, but only permits parties to reclamation contracts to "join the United States as a necessary party defendant" in a district court action when necessary "to adjudicate, confirm, validate, or decree" a dispute over reclamation contract rights. The plain language of §390uu demonstrates Congress' intent to subject the sovereign to suit in district court only where other litigants seek to adjudicate conflicting claims of contract rights and the United States' presence is necessary for a complete adjudication of those rights. Unlike the Tucker Act, 28 U.S.C. §1491, which permits contract damages against the United States in the Court of Federal Claims, the Reclamation Reform Act does not allow damages actions against the United States for breach of a reclamation contract.

Second, the contracting parties' intent as established by the contract language and statutory context forecloses petitioners' effort to sue as third-party beneficiaries for consequential contract damages. Congress in the 1920s amended the reclamation laws to transform the reclamation program from a regime of direct contractual relationships with individual water users to one in which the Bureau could only contract with state-authorized districts. The 1963 contract implements Congress' intent to minimize the risk to the federal treasury and

to promote administrative efficiency by ensuring that the rights and obligations under the contract belong exclusively to the United States and the District and by expressly limiting the United States' damages liability.

ARGUMENT

I. THE UNITED STATES HAS NOT CONSENTED TO BE SUED IN DISTRICT COURT BY INDIVIDUAL WATER USERS SEEKING DAMAGES FOR ALLEGED BREACHES OF THE BUREAU'S RECLAMATION CONTRACTS

The courts below were correct that the United States' waiver of sovereign immunity in 43 U.S.C. §390uu does not authorize federal district court jurisdiction in this suit for consequential contract damages. Although those courts focused their sovereign immunity inquiry on whether petitioners were intended beneficiaries of the 1963 contract, there are several threshold reasons why §390uu cannot be construed to waive sovereign immunity in this action.[6]

Section 390uu provides, *inter alia*:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. . . .

Surprisingly, petitioners and their *amici* never discuss this statutory language. Nor do they explicitly address sovereign immunity at all, which, as a jurisdictional issue, cannot be waived, *see United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940), and must precede any consideration of the merits, *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-94 (1998).

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). "In the absence of clear congressional consent, . . . 'there is no jurisdiction. . . to entertain suits against the United States.'" *Mitchell*, 445 U.S. at 538 (quoting *Sherwood*, 312 U.S. at 587-88)). A waiver of "sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Any waiver of immunity "will be strictly construed, in terms of its scope, in favor of the sovereign." *Id.* Thus, this Court will "construe ambiguities in favor of immunity," *United States v. Williams*, 514 U.S 527, 531 (1995), and any "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied," *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981).

A. The United States Has Not Been Joined As A Necessary Party Defendant

"The terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." *Sherwood*, 312 U.S. at 586. Although Congress in the Tucker Act, 28 U.S.C. §1491, consented to allow suits in the Court of Federal Claims for contract damages, Congress in §390uu only consented to federal district court jurisdiction in that

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[6] The only other supposed statutory waiver invoked by petitioners below was the McCarran Amendment, 43 U.S.C. §666, but petitioners do not contest the Ninth Circuit's ruling that this private damages action is not the type of general stream adjudication contemplated by that statute. Pet. App. 7a; *see Dugan v. Rank*, 372 U.S. 609, 618 (1963).

Although petitioners named defendants other than the "United States" in their amended complaint, those defendants are all federal agencies or federal officials (and while respondent NRDC intervened as a defendant below, petitioners asserted no contract claim against it). WER 31, 37-38. Because petitioners seek damages only from the federal treasury, their lawsuit is only against the United States for sovereign immunity purposes. *See Dugan*, 372 U.S. at 621; *Stafford v. Briggs*, 444 U.S. 527, 542 n.10 (1980).

narrow class of cases where litigants seek to adjudicate competing claims of right under a reclamation contract and "joinder" of the United States as an additional party defendant is "necessary" for a full and fair adjudication of rights under that contract. The present suit, to which the United States has *not* been "join[ed] . . . as a necessary party defendant" but instead involves a breach of contract claim directly against the United States, is not the type of suit involving competing claims of right by parties other than the United States to which Congress consented in enacting §390uu.

Because a waiver of "sovereign immunity must be unequivocally expressed in statutory text," *Lane*, 518 U.S. at 192, the sovereign immunity inquiry must begin and end with the plain statutory language. *Id.* ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text."). Section 390uu by its terms applies only to cases in which the United States has been "join[ed] . . . as a necessary party defendant." This phrase invokes Federal Rule of Civil Procedure 19, the purpose of which is to facilitate, through the joinder of necessary parties, a full and complete adjudication of claims. Fed. R. Civ. P. 19 Advisory Comm. Notes (1966 amendment) ("complete disposition"); 7 Wright, Miller & Kane, Federal Practice and Procedure: Civil §1602 at 20 (3d ed. 2001) ("full adjudication"). Rule 19(a) permits the "joinder" of a party if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other-wise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). Rule 19(b) requires dismissal of an action if a party that satisfies the requirements of Rule 19(a)

is "indispensable" to that action but cannot be joined. Fed. R. Civ. P. 19(b). Although the 1966 amendment to Rule 19 eliminated the previously-used term "necessary," courts continue to use the term, either as a synonym for "indispensable," *see, e.g., Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 6 (1991); *Idaho v. Oregon*, 444 U.S. 380, 386 (1980), or to refer to the broader group of parties whose joinder under Rule 19(a) is desirable but not required, *see Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116 n.12 (1968). Under either approach, a "necessary party" is one who satisfies the "threshold" requirements of Rule 19(a). *See Temple*, 498 U.S. at 8 (party is not indispensable under Rule 19(b) unless it satisfies "threshold" requirements of Rule 19(a)).

By including the specific "join . . . as a necessary party defendant" language in §390uu, Congress limited the statutory waiver to district court cases in which the parties, whose dispute requires judicial construction of a reclamation contract, cannot obtain complete relief without joining the United States, *cf.* Fed. R. Civ. P. 19(a)(1), or where the absence of the United States would impair or impede the government's interest in its contract or subject the other litigants to potentially inconsistent judgments, *cf.* Fed. R. Civ. P. 19(a)(2). Under these scenarios, parties other than the United States (*e.g.*, two water districts, or a water district and water user) seeking judicial construction of a reclamation contract may join the United States as a defendant in their district court action as necessary to obtain complete adjudication of their competing claims.

That Congress did not intend §390uu to authorize contract damages actions directly against the United States is confirmed by comparing other statutory waiver language in which Congress consented more broadly to contract actions against the United States. The Tucker Act, for instance, grants the Court of Federal Claims jurisdiction "upon any

claim against the United States founded . . . upon any express or implied contract with the United States." 28 U.S.C. §1491 (a)(2). The "little" Tucker Act, waiving immunity in district court actions for contract claims under $10,000, applies to "[a]ny . . . civil action or claim against the United States . . . upon any express or implied contract with the United States." 28 U.S.C. §1346(a)(1). These statutes do not contain the additional limiting language requiring that the United States be "join[ed] . . . as a necessary party defendant." "[W]hen Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *see also Sherwood*, 312 U.S. at 588-92 (because Tucker Act waiver is "conditioned . . . on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government," immunity not waived in contract dispute against United States that required joinder of additional private defendant).

The phrase "join[ed] . . . as a necessary party defendant" in §390uu finds striking parallel in the language of the McCarran Amendment, 43 U.S.C. §666 ("Consent is given to join the United States as a defendant in any suit, [*inter alia*] . . . . for the administration of [water] rights . . . [where] the United States is a necessary party to such suit "). The purpose of the McCarran Amendment was to ensure that the immunity of the United States would not interfere with the states' "administration of and adjudication of water rights," in which "all water users on a stream, in practically every case are interested and necessary parties to any court proceedings" due to the "interlocking" nature of "adjudicated rights on any stream system." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810-11 (1976) (quoting S. Rep. No. 82-755, 4-5 (1951)). While the purpose of the McCarran Amendment is to facilitate the adjudication of water rights, it

"'is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream.'" *United States v. District Court*, 401 U.S. 520, 525 (1971) (quoting S. Rep. No. 82-755 at 9). In *Dugan*, this Court held that the McCarran Amendment did not confer jurisdiction over a "private suit to determine water rights solely between [various water right claimants] and the United States," distinguishing the "private suit" before it and the "general" adjudications of water rights contemplated by the McCarran Amendment, in which "all of the claimants to water rights along the river are . . . made parties" and "relief is either asked or granted as between claimants." 372 U.S. at 618.

Like the McCarran Amendment, §390uu serves a narrow but important function—to permit a complete adjudication of rights under reclamation contracts with all necessary parties present, including the United States. A single reclamation project frequently delivers water under contracts to multiple water districts, which often assert competing priorities on project water. *See, e.g., Westlands Water Dist. v. Patterson*, 864 F.Supp. 1536, 1537-38, 1541-42 (E.D. Cal. 1994). Section 390uu ensures that the federal government's general immunity from suit will not prevent water districts from clarifying their potentially competing rights under, or relating to, a reclamation contract, as against the United States and other districts.

The only parties to this litigation asserting contract rights are petitioners; and the only party against which petitioners assert contract rights is the United States. Given the circumstances identified in Rule 19 for joinder of a necessary defendant, the absence of any joinder language in statutes that waive immunity in direct contract actions, and this Court's construction of the parallel language of the McCarran Amendment, §390uu should not be construed to waive sovereign

immunity in petitioners' "private suit . . . solely" against the United States. *Cf. Dugan,* 372 U.S. at 618.

B. Congress Has Not Unequivocally Authorized A Damages Remedy

This case falls outside the class of cases encompassed by §390uu for the independent but related reason that petitioners seek damages from the federal treasury. Congress did not unequivocally consent to a damages remedy in waiving immunity from suits where joinder of the United States is necessary for a complete adjudication of the rights of other litigants.

"To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192; *see also United States v. Nordic Village*, 503 U.S. 30, 34 (1992) (although §106(c) of the Bankruptcy Code "waives sovereign immunity, it fails to establish unambiguously that the waiver extends to monetary claims."). In *Lane*, the government's waiver of immunity under the Rehabilitation Act was held not to permit a claim for damages because the waiver did not "extend unambiguously to such monetary claims." 518 U.S. at 192. This Court contrasted the Rehabilitation Act's waiver language with other statutes in which Congress had demonstrated its "ability to craft a clear waiver of the Federal Government's sovereign immunity against particular remedies." 518 U.S. at 194. In *Nordic Village*, the Court similarly held that a provision of the Bankruptcy Code waiving the government's immunity did not include claims for monetary relief where the provision was susceptible of a "plausible" interpretation that barred monetary recovery. 503 U.S. at 35, 37.

Section 390uu's waiver language does not unambiguously allow claims for money damages. *Compare, e.g.,* 28 U.S.C. §1346, §1491 (waiving immunity in certain contract claims "for liquidated or unliquidated damages"); *see Nordic Village*, 503 U.S. at 37 ("the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text."). Instead, Congress specifically limited §390uu to specified "suit[s] to *adjudicate, confirm, validate, or decree* the contractual rights of a contracting entity and the United States" (emphasis added), thus using language encompassing only declaratory and perhaps injunctive relief. *Cf.* Art. 32 at JA 56-57 (standard reclamation contract language requiring judicial "validation" proceedings before the 1963 contract became binding). The limited scope of this waiver is fully consistent with the underlying purpose of §390uu—to enable litigants with competing reclamation contract claims to obtain a judicial clarification of their rights in a single district court proceeding. Full and fair adjudications of those claims can, of course, be achieved without any award of monetary damages where, for instance, different water districts wish to clarify their potentially competing priorities to water from the same reclamation project.[7]

[7] Even if §390uu could be construed to permit some damages liability, it would at most permit damages owed to a water district itself, as the "contracting entity." *See* 43 U.S.C. §390uu ("suit to adjudicate confirm, validate, or decree the contractual rights of a *contracting entity*"). Nothing in §390uu expresses the United States' consent to be sued by a non-contracting party for third-party damages that a contracting district could not have sought on its own behalf. *See* Pet. 24-25 & n.31.

Of course, petitioners were not without a mechanism for pursuing their claims against the Bureau. If petitioners were correct in their third-party beneficiary analysis, they could have brought this contract damages case in the Court of Claims. Pet. App. 22a. Petitioners could also have challenged the Bureau's allegedly unlawful agency action under the Administrative Procedure Act, which waives the government's immunity in suits for declaratory or injunctive relief where plaintiffs have "suffer[ed] legal wrong because of agency action" or are "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. §702. Petitioners also had the option of pursuing an action to enforce the *Barcellos I* judgment, which they earlier did in urging their current contract construction, *see O'Neill*, 50 F.3d at 681-82, and in asserting other related claims, *see Barcellos II*, 899 F.2d at 819-20.

C. Petitioners Cannot Overcome The Bar Of Sovereign Immunity By Asserting Third-Party Beneficiary Status

Although petitioners do not address sovereign immunity directly, the implication of their argument is that §390uu waives sovereign immunity, despite the express conditions on the waiver discussed above, in any case brought by an intended third-party beneficiary of a reclamation contract. This argument must also fail.

On its face, §390uu allows suits only over the rights of "contracting entit[ies]." It says nothing about "third-party beneficiaries." While the term "contracting entity" might plausibly be construed to include successors and assigns, *cf.* Art. 31(a) at JA 55, no reasonable construction encompasses non-party beneficiaries, whether intended or incidental. A waiver of immunity, this Court has instructed, "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane*, 518 U.S. at 192; *see also Ardestani v. INS*, 502 U.S. 129, 137 (1991). As third parties to the 1963 contract, petitioners are not "contracting entities." Indeed, petitioners have made clear that they seek to enforce their own rights to consequential damages, separate and distinct from any damages the District as "contracting entity" could have claimed. *See, e.g.*, Pet. Br. 45 & n.54; Pet. 24-25 & n.31; Ninth Cir. Docket (June 25, 2001), Orff Appellants Opening Br. at 2 ("The farmers sue to recover the damages *they have suffered* as a consequence of the government's violation of *their* water rights.") (emphasis added). Strict construction in favor of the sovereign, *see Lane*, 518 U.S. at 192, militates against allowing a third party to enforce contract rights unavailable to the "contracting entity" itself.[8]

[8] Where Congress intends to subject the government to suit for contractual breaches by non-contracting entities, it does not use limiting language such as "contracting entity." The Tucker Act, for example, which has been interpreted to permit suits by intended third-party beneficiaries, *see, e.g., Chancellor Manor v. United States*, 331 F.3d 891, 900-01 (Fed. Cir. 2003), waives immunity for "any claim against the United States founded [upon the Constitution, statutes, or regulations], or upon any express or implied contract with the United States." 28 U.S.C. §1491. While §390uu waives immunity in "any suit . . . regarding any [reclamation] contract," it also includes the additional limiting phrase "to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity," which has no counterpart in the Tucker Act. To construe §390uu as permitting third parties to enforce their own supposed contract rights would strip this additional contract language of independent meaning and thereby override a condition Congress has attached to the waiver of immunity. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("We are reluctant to treat statutory terms as surplusage in any setting.") (internal quotation marks, citations omitted); *Block*, 461 U.S. at 287 ("conditions [on a waiver of immunity] must be strictly observed").

Second, even if the term "contracting entity" could be construed to encompass intended beneficiaries, petitioners are not intended beneficiaries for purposes of their current suit for contract damages. For the reasons stated below, permitting such claims under the 1963 contract would be inconsistent both with federal reclamation policy and with the express terms of that contract.

II. PETITIONERS MAY NOT SUE FOR CONSEQUENTIAL DAMAGES AS THIRD-PARTY BENEFICIARIES OF THE 1963 CONTRACT

Whether presented in the context of sovereign immunity or third-party standing, petitioners' intended beneficiary argument glosses over two critical features of their underlying claim. First, petitioners do not seek simply to enforce the Bureau's promises to the District in the 1963 contract, but to obtain monetary compensation for their *own* claimed resulting losses. Indeed, petitioners argue (as a point supposedly in their favor) that the District itself could not have sued the Bureau for petitioners' consequential damages. Pet. Br. 45 & n.54; Pet. 24-25 & n.31. Second, petitioners seek to sue upon

a *government* contract, executed pursuant to the federal reclamation laws. Unlike a simple commercial contract for the sale and delivery of a commodity, government contracts in general, and reclamation contracts in particular, confer valuable benefits on many segments of the public. If each beneficiary were entitled to sue for consequential lost-profit damages not available to the promisee itself, the government would be exposed to a multiplicity of suits and financial liability far beyond expectations, undermining the fundamental principle that all contracts should be construed to effectuate the contracting parties' intent.[9]

A. A Direct Action For Consequential Damages By A Third Party To A Government Contract Can Only Proceed If Consistent With The Contracting Parties' Intent And The Laws Under Which The Contract Was Executed

Petitioners state that the "proper test" for evaluating intended third party beneficiary status is "whether the parties to the contract intended it to be for [their] direct benefit, so as to entitle [them] to sue." Pet. Br. 23-24 (citing *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912), *Hendrick v. Lindsay*, 93 U.S. 143, 147 (1876)). Certainly the Court's inquiry should focus on the parties' intent, given the axiomatic principle that all contracts should be interpreted to effectuate the parties' intent. *See, e.g.*, Melvin A. Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358, 1375-76, 1385-88 (1992). However, petitioners have not shown that permitting them to sue for contract

[9] We recognize that if a third party's status as intended beneficiary depends in part upon whether the requested relief is consistent with the contract language and structure, that third party might have standing to bring some claims (*i.e.*, specific performance) but not others (*i.e.*, damages other than the promisee's). In the present case, petitioners seek only their own consequential damages, which is the clearest example of a claim beyond the contracting parties' reasonable expectations.

damages would be consistent with the contracting parties' objectives.

In *German Alliance*, this Court held that an individual property owner, whose property was damaged by fire, could not sue for consequential damages as a third-party beneficiary of a contract to supply water to city fire hydrants. 226 U.S. at 230-33. The Court stated as a threshold matter that the third party must, "*at least*, show that [the contract] was intended for his direct benefit." *Id.* at 230 (emphasis added). Because government contracts are often entered "for the benefit of the inhabitants [of the jurisdiction] collectively," the "exceptional privilege" of maintaining a third-party suit should not be available to protect the "incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives." *Id.* at 230-31. As Chief Justice Cardozo similarly explained in rejecting a third-party beneficiary suit for consequential damages for breach of a city water supply contract, "[i]n a broad sense it is true that every city contract, not improvident or wasteful, is for the benefit of the public. More than this, however, must be shown to give a right of action to a member of the public not formally a party." *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 897 (N.Y. 1928).

This Court in *German Alliance* particularly focused on plaintiff's damages claim in concluding that third-party remedies would be inconsistent with the contracting parties' intent. 226 U.S. at 231-32. The city's exposure to expanded monetary liability and the risk of multiple suits by different segments of the populace "could not have been[] in contemplation of the parties" given the underlying contract purposes and price terms. *Id.* at 231; *see also id.* at 232 ("the amount of payment would naturally have varied with the risk assumed" had the parties intended the water company to assume the risk of consequential third-party damages). Because the economic burden was disproportionate to the risk

assumed, foreclosing damages liability to third parties was "in accordance with the particular intent of those who made this agreement." *Id.* at 232; *see also H.R. Moch,* 159 N.E. at 897-98 ("An intention to assume an obligation of indefinite extension to every member of the public is seen to be the more improbable when we recall the crushing burden that the obligation would impose."); Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. at 1375-76.[10]

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[10] The fact that the property owner in *German Alliance* could not have maintained an action for damages against the city as promisee, *id.* at 232-33, is consistent with the efficiency rationale for permitting third-party contract enforcement. Allowing a third party to sue the promisor directly promotes the contracting parties' intent "with the least amount of litigation" if the third party could have sought that relief from the promisee, who in turn could have sought it from the promisor. Arthur L. Corbin, *Corbin on Contracts* §775 at 729 (1952); *Restatement (Second) of Contracts* ("Restatement") §313(2)(b) (1979).

That rationale is absent where, as here, the third party could not sue the promisee for its requested damages. Under the District's "Terms and Conditions for Agricultural Water Service," http://www.westlandswater.org/aboutwwd/regs0.htm (Jan. 14, 2002) (last visited Jan. 4, 2005) ("Terms"), it appears that petitioners could not have obtained damages from the District itself. Those Terms, to which agricultural water users agree "[b]y applying for or taking delivery of agricultural water from the District," *id.* ¶25, disclaim any liability for shortages resulting from causes "beyond the District's reasonable control," *id.* ¶3, and provide that the District has the right to establish the water charges and to include in those charges the District's costs of its repayment obligation to the Bureau and any charges pursuant to the CVPIA:

> Charges for agricultural water . . . shall include District operation and maintenance costs and any other costs determined by the Board to be payable as part of the water charges, including components established for the payment of all or a portion of the District's annual repayment obligation to the United States, administrative fees, and land-based charges. *The water charges shall also include the applicable water rates required pursuant to the Reclamation Reform Act of 1982, the Central Valley Project Improvement Act of 1992, and the Judgment in Barcellos and Wolfsen, Inc., et al. v. Westlands Water District, et al.*, and *Westlands Water District, et al. v. United States, et al.*, ...

Id. at ¶8 (emphasis added). These Terms nowhere cap allowable water charges.

Petitioners cite state court cases from Florida and Alabama that permitted property owners to sue as intended beneficiaries under a city's water supply contract. Pet. Br. 41 n. 48. But one of those cases predates *German Alliance* and the other ignores it. Moreover, neither applies the principle, established under federal common law by *German Alliance* and echoed in the Restatement, that the crucial inquiry in government contract cases is whether allowing the third party's consequential damages would implement the contracting parties' intent.[11]

Petitioners assert that they are not simply members of the public, but have a unique relationship with the District, which acts not as an ordinary governmental entity but as their "surrogate." Pet. Br. 44. The factual record and history of litigation between petitioners and the District belies petitioners' contention that the District is a passive instrument of their interests, rather than a political subdivision whose varied

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[11] The Restatement explains that third-party beneficiary principles governing private contracts apply to "contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach." Restatement §313(1). Where a beneficiary to a government contract sues "for consequential damages resulting from performance or failure to perform," the suit may only proceed if "(a) the terms of the promise provide for such liability; or (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach." *Id.* §313(2). *See Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947) (where "Congress has not adopted a different standard," this Court applies "to the construction of government contracts the principles of general contract law" set forth in its prior decisions and sources such as the Restatement).

constituents have diverse and often competing concerns. *See supra* at 11; WER 305.[12] Nor does petitioners' erroneous characterization of the District as a private rather than governmental entity diminish the public nature of the 1963 contract, because that contract is also with the Bureau, an agency of the United States government that is charged with serving a varied constituency in implementing a broad range of reclamation, flood control, recreation, and environmental mandates. *See German Alliance*, 226 U.S. at 231 ("every citizen has [interest] in the performance of every . . . contract made by and with the government under which he lives"). The federal reclamation program's purposes extend far beyond providing irrigation to specific lands covered by water delivery contracts. While petitioners may derive economic benefit from the federal reclamation program, they merely form one subgroup of one instrumentality for accomplishing one of Congress' objectives—which also include promoting navigation, flood control, and family farms, and protecting fisheries and water quality. *See, e.g.*, Act of August 26, 1937, ch. 832, §2, 50 Stat. 844, 850; CVPIA, Pub. L. No. 102-575, §3406(a), 106 Stat. 4706, 4714; *Federal Reclamation Law*, §120.1 at 210; *supra at* 2-4. Given the broad statutory purposes underlying the 1963 contract, petitioners cannot establish intended beneficiary status based simply on the fact that petitioners' farmlands receive supplemental CVP water, particularly because, as shown below, allowing petitioners to sue for their unique consequential damages would hamper Congress' reclamation policies and

[12] *See also* Westlands Water District, "*District Description*," *available at* http://www.westlandswater.org/aboutwwd/distdesc1.htm (last visited Jan. 4, 2005) (the District provides water to many agricultural water users in addition to petitioners, and its contract permits delivery to municipal and industrial water users).

would be inconsistent with the limitations on liability set forth in the 1963 contract.[13]

[13] *See Federal Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 87-89 (1958) (government contracts should be construed against the backdrop of the authorizing statute's policies); *see also Martinez v. Socoma Cos.*, 11 Cal.3d 394, 402 n.2, 406 (1974) (disadvantaged individuals could not seek consequential damages as third-party beneficiaries to federal contracts with businesses to provide job training and to employ disadvantaged individuals because contracts "were designed not to benefit individuals as such but to utilize the training and employment of disadvantaged persons as a means of improving the East Los Angeles neighborhood"); *Gonzalez v. City of Mission*, 620 S.W. 2d 918, 922 (Tex. App. 1981) (homeowners could not sue for damages as third-party beneficiaries of grant disbursement contract between the City and HUD which "clearly shows that it was designed to assist a broad class of people, not just one individual family"); *Chancellor Manor*, 331 F.3d at 901 (owners of low-income housing projects were not intended beneficiaries of government's mortgage guarantee contract with lenders: "The primary, direct beneficiary of the Insurance Commitment was the public").

Petitioners assert that individuals served by "special or limited government units" may sue as third-party beneficiaries to such entity's contract with the government. Pet. Br. 44 n. 51. The cases they cite, however, involve contracts between Indian Tribes and the federal government and do not support petitioners' assertion. In *Busby School of Northern Cheyenne Tribe v. United States,* 8 Cl. Ct. 596 (1985), and *Hebah v. United States*, 428 F.2d 1334 (Ct. Cl. 1970), individual tribe members were permitted to sue the federal government under its contracts with their Tribes, but those plaintiffs had a special connection to their Tribe as promisee and a unique relationship with the federal government as promisor which petitioners here lack. In *Carlow v. United States,* 40 Fed. Cl. 773 (Ct. Cl. 1998), a construction contractor that had executed a contract with a Tribe was permitted to sue the federal government for unpaid services as third-party beneficiary to a contract between the Tribe and the federal government because the contract manifested the parties' intent that "the United States []satisfy the legitimate debts and obligations of the Tribe to contractors who performed compensable work on the road construction project." *Id.* at 783.

B. Allowing Third-Party Damages Claims Against The United States Is Inconsistent With Federal Reclamation Policy

Under the original 1902 reclamation program, individual water users filed "water right applications" with the Bureau which, once approved, established a direct contractual relationship between the user and the Bureau. *See* H. R. Rep. No. 67-662, at 6 (1922). Congress subsequently concluded that this system of direct contracting created undue financial risk and administrative complication, and amended the Reclamation Act to authorize the Bureau to contract instead with irrigation districts, state-created governmental bodies with tax-setting power. Act of May 15, 1922, ch. 190, §1, 42 Stat. 541, 43 U.S.C. §511; H. R. Rep. No. 67-662, at 1; *see* Cal. Water Code §§20500 *et seq*. Congress intended thereby to provide "better security" for the government's investment, by insulating the United States from the consequences of individual user defaults (because the district as contracting entity would remain liable for its contract obligations) and from the administrative burden of interacting with individual water users.[14] In 1926, Congress completed the transformation of

[14] H. R. Rep. No. 67-662, at 1 ("The United States will have better security for the money expended in the construction of reclamation projects. Instead of the individual obligation of the water users, the Government will have the obligations of legally organized irrigation districts, being municipal corporations possessing the power to assess and collect taxes on all of the lands within the district."); 62 Cong. Rec. at 3574 (1922) (Rep. Kinkaid) (by contracting with districts, "the security of the Government for the amount due it is materially increased"); *id.* (Rep. Hayden) (contractual obligation of entire district to pay government "is vastly better security for the repayment of the sums due to the United States than the individual obligations of water users"; "the enactment of this bill provides a means whereby there will be less risk of the loss of any part of the money expended out of the reclamation fund"); *id.* at 3575 (Rep. Mondell) ("There are difficulties that arise from the collection of the charges from the individual."); *id.* at 3578 (Rep. Sinnott) ("if anybody defaults in his payment," the entire district will remain liable); *id.* at 3580 (Rep. Dempsey) ("the Government is [not] going to collect from these individuals with the ease, with the certainty, or in the amount that it will collect from the irrigation districts"); *id.* at 5859 (Sen. McNary) ("The security is very much better because the Government is dealing with organized irrigation districts rather than the various individual entrymen who take water in the projects."). The population living on lands irrigated by reclamation projects increased by more than 25% from 1918 to 1922. *See* S. Doc. 68-92, at 92 (1924). Congress' concerns about the risks and burdens of direct contracting are only heightened today, given the vast numbers of individual water users. The Bureau reports that in 1992 the CVP supplied irrigation water to almost 22,000 farms. Bureau of Reclamation, Central Valley Project Data, http://www.usbr.gov/dataweb/html/mpcvpprjdata.html (last visited Jan. 4, 2005)

the reclamation contracting regime by requiring, and not merely authorizing, the Bureau to contract with irrigation districts rather than individual water users. Omnibus Adjustment Act of 1926, ch. 383, §46, 44 Stat. 636, 649, 43 U.S.C. §423e.

Construing the 1963 contract to allow individual water users to sue the Bureau for consequential damages is inconsistent with the purpose of these amendments—and thus not likely what the contracting parties intended. Permitting third-party contract actions would effectively reintroduce the old regime of direct contractual relationships, burdening the Bureau by eliminating its reciprocal right of enforcement (which had allowed the Bureau to sue water users for their alleged breaches) while subjecting the federal government to consequential damages liability that would dwarf the financial risk that Congress had previously found intolerable.

Allowing direct contract enforcement rights would also undermine the efficient administration of the reclamation laws and would invite a multiplicity of litigation. The number of third-party beneficiaries who could bring contract damages actions under petitioners' theory potentially includes all individuals with any alleged contractual or state law property "right" to water. *See, e.g.*, Pet. Br. 40-41. Within the

District alone, this group includes all those with an interest in one or more of the 600 farms that the District asserts it serves.[15] Each of these purported "rightholders" could potentially sue for different relief, at different times, in different courts, against different defendants.[16]

As this case illustrates, individual landowners within a water district may assert a right to sue when the district itself would not, urging their own interests at the expense of the interests of the district or other landowners or water users. Allowing individual landowners to sue, after the district itself concludes that litigation would be unwise or unnecessary, would necessarily interfere with the district's ability to balance competing interests of water users within its boundaries

[15] Westlands Water District, "*Who We Are*," *available* at http://www.westlandswater.org/wwd/aboutwwd/aboutwwd.asp (last visited Jan. 4, 2005) ("*Who We Are*").

[16] It is not clear who, precisely, would have water "rights" under petitioners' theory. Petitioners describe the purported rightholders as "farmers," "water users" or "landowners," but those terms are not interchangeable. Farming operations on land receiving reclamation project water are often conducted by entities other than the landowners. *See* 43 CFR §428.3 (defining "farm operator" as "an individual or legal entity other than the owner, lessee, or sublessee that performs any portion of the farming operation"). If petitioners would vest "rights" in individuals who apply the water *or* who own the land, many individuals and entities would have competing claims to the "same" water. If, however, petitioners would impose both application and ownership requirements, individual homeowners who tend a backyard garden could qualify as "rightholders" while some petitioners would not. Petitioners Edwin R. O'Neill and his family, for example, "own *or* operate approximately 7,900 acres of farmland within Area I of the Westlands Water District." Dist. Ct. Docket No. 487 (Jan. 11, 1996), Supp. Decl. of Edwin R. O'Neill at ¶3 (emphasis added). Nor is it clear what constitutes "ownership" under petitioners' argument—whether it extends only to owners in fee simple, or whether ownership interests could be asserted by any individual with some kind of state law property interest (for example, a mortgagor or an individual with a future interest)—again, potentially resulting in competing claims by different individuals and entities.

and to advance its own governmental goals. Moreover, because of the risk of collateral estoppel, allowing individual litigation could compel intervention by all water districts and users who claim an interest or priority. *See supra* at 11 & 12 n. 5. And of course, petitioners' approach would subject the federal government to a multiplicity of litigation, increasing transaction costs, risking inconsistent judgments, and reducing the government's incentive to enter into master settlement agreements such as the Delta Accord, or *any* settlement, that could be collaterally attacked by individual water users. The threat of endless litigation by individual water users at different times in different courts asserting different theories based on different contract provisions cannot be reconciled with Congress' intent to insert water districts as an intermediary between the federal government and individual water users.

C. Allowing Third-Party Damages Claims Against The United States Is Contrary To The Contracting Parties' Intent As Manifested In The 1963 Contract

The language and structure of the 1963 contract provide further compelling evidence that the contracting parties did not intend to permit petitioners to sue for their own consequential damages.

1. *A Direct Action By Petitioners Against The United States Is Inconsistent With The Exclusive Exchange Of Performance Obligations Between The Bureau And The District*

Under the contract, the Bureau delivers supplemental water to the District, which in turn makes deliveries to individual water users. Art. 3 at JA 34-36; "*Who We Are*," *supra* n. 15. The Bureau does not furnish any water directly to these individual water users. Rather, once it delivers water to the District's central delivery points, its performance obligations end and the contract explicitly absolves it of any subsequent

liability. *See* Art. 9(c) at JA 40-41("The United States shall not be responsible for . . . claim of damage of any nature whatsoever . . . arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such water beyond such delivery points").

On its face, the contract gives individual water users no right to receive water under the contract, even upon fulfillment of their payment obligations, independent of the District's own contract rights. Although the District delivers the water and charges individual water users through taxes and assessments, *see* Art. 16 at JA 46, the District remains obligated to pay the United States even if one or more individual water users fail to pay the District: "The District as a whole is obligated to pay to the United States the charges becoming due as provided in this contract notwithstanding the default in the payment to the District by individual water users of assessments, tolls, or other charges levied by the District." Art. 14 at JA 45. Further, any default by individual water users causing the District to fail to meet its payment obligations bars deliveries of any water to all water users in the District, even those that fully satisfy their own payment obligations. *See* Art. 17 at JA 46 ("No water shall be furnished to the District or by the District to or for the use of any lands or parties therein during any period in which the District may be in arrears."). In short, individual water users have no separate or independent rights from the District under the 1963 contract.

The only provision in the 1963 contract that acknowledges potential rights in third parties is Article 31, the assignment provision, which states: "The provisions of this contract shall apply to and bind the successors and assigns of the respective parties." JA 55. This language demonstrates that when the parties intended to vest their enforcement rights in third parties, they knew how to do so. Article 31 further states that "no assignment or transfer of this contract or any part thereof

or interest therein shall be valid until and unless approved by the United States." *Id.* Like the provisions making the District and the Bureau solely responsible for contract compliance, this language reflects the parties' intent to limit third-party enforcement rights only to those successors and assigns who are explicitly "approved" by the United States. Petitioners have not been assigned rights under the contract, Pet. App. 14a n.4, nor could they have been under the 1926 Reclamation Act amendments, which prohibit the Bureau from entering into reclamation contracts with individual water users. *See supra* at 30-31.[17]

2. *A Direct Action By Petitioners Against The United States For Consequential Damages Undermines The Parties' Intent To Limit The Bureau's Contract Liability*

Several contract provisions explicitly limit the Bureau's potential liability and thereby reflect the parties' intent not to subject the Bureau to potentially massive third-party consequential damages liability. As noted above, the contract includes an explicit no-liability-after-delivery clause, which protects the Bureau from liability for acts or omissions arising after the Bureau has delivered reclamation water to the District's designated "delivery points." *See* Art. 9(c) at JA 40-41. Individual water users of course, receive their water only after it has been delivered to the District; and their claim for damages resulting from post-delivery taxes, assessments,

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[17] Petitioners quote the contract language that the right to an "adjustment" in the event of water shortages or apportionment shall be the sole remedy of the District or anyone claiming "by, through, or under the District." Pet. Br. 30 (citing Art. 9, 11). But in the context of the contract as a whole and given the contract's structure and purposes, that restriction on remedies must logically refer to a successor or assignee of the District that has been approved by the United States under Article 31. *See* Pet. App. 13a-14a. The language may also permit CVPIA-based water transfers, which were authorized after the 1963 contract. *See infra* at n. 27.

and distribution cannot be reconciled with this limitation on liability.

Further, as the Ninth Circuit concluded in *O'Neill*, 50 F.3d at 682-84, the contract broadly immunizes the Bureau from liability for any damage arising out of any water shortages. *See* Art. 11(b) at JA 42 ("in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes."). The contract also specifies that the *exclusive* remedy for any water shortages is an "adjustment," that is, an elimination of any charges for the undelivered water. *See* Art. 7 at JA 39 (defining "adjustment"); 11(b) at JA 43 ("To the extent of such deficiency, such adjustment shall constitute the sole remedy"). If the District were itself bringing this case, the relief sought by petitioners would be expressly barred by the terms of the contract. Petitioners should not be able to assert greater rights than could the District, as the contracting party. *See United Steelworkers v. Rawson*, 495 U.S. 362, 375 (1990) ("third-party beneficiaries generally have no greater rights in a contract than does the promisee"); Restatement §309(c), comment b ("Where there is a contract, the right of a beneficiary is subject to any limitations imposed by the terms of the contract. Such a limitation may be imposed by the agreed terms, or it may be imposed in the absence of contrary agreement by virtue of considerations of fairness and public policy."). Petitioners offer no justification for their remarkable inference that the contracting parties *implicitly* granted to water users the very right they *expressly* denied to the District—the right to sue the United States for contract damages.

The contract's fixed price over its 40-year term provides further indication of the contracting parties' intent to limit the Bureau's potential contractual liability. *See* Art. 6(a) at JA 38. That price term does not rise or fall with the value of the

agricultural land that receives contract water. Nor does it fluctuate with the market for the agricultural products produced on those lands. To permit liability against the Bureau for third parties' consequential damages—particularly if those third parties could seek their own damages in addition to, rather than in place of, any remedy that the District could obtain—would be wholly disproportionate to the financial risk the government assumed in entering into this contract. *See German Alliance*, 226 U.S. at 232 (contract provision establishing fixed price over extended contract period indicates that liability to third parties for consequential damages "was not in the contemplation of the parties. . . . Otherwise the amount of payment would naturally have varied with the risk assumed.").[18]

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[18] In none of the third-party beneficiary governmental contract cases cited by petitioners (Pet. Br. 24 & n. 37) did plaintiffs seek their own consequential damages (rather than the promisee's) under a contract that limited or eliminated such damages. In *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981), low-income tenants were permitted to enforce a HUD contract with a project owner to provide rent subsidies to plaintiffs in exchange for a HUD-insured or HUD-held mortgage. Plaintiffs merely sought to enforce HUD's promise to give them rent subsidies; they did not seek consequential damages for contractual breach. *Id.* at 1265, 1276. In *Guardsman Elevator* Co. *v. United States*, 50 Fed. Cl. 577 (Ct. Cl. 2001), an elevator service company sued HUD for the cost of the services rendered to a housing project owner that had a contract with HUD. Plaintiff sought to recover only for services rendered to the project owner, not consequential damages for breach of the promise to pay. *Id.* at 579-80. In *Schuerman v. United States*, 30 Fed. Cl. 420 (Ct. Cl. 1994), borrowers were permitted to sue on a loan guarantee agreement between the Farmers Home Administration and a lender, but the contract actually "identif[ied them] as the borrowers of the guaranteed funds." *Id.* at 433. In *Audio Odyssey, Ltd. v. United States*, 255 F.3d 512, 521-22 (8th Cir. 2001), a borrower sued the SBA under a loan guarantee agreement between the SBA and the bank that had seized plaintiff's property. In the opinion cited by petitioners, the Eighth Circuit allowed plaintiff to sue for the SBA's failure to provide written (rather than oral) approval before the seizure, without indicating what damages were requested or whether the

D. Petitioners Have No State Or Federal "Right" To Reclamation Water That Requires A Different Analysis Of Their Third-Party Beneficiary Status

Petitioners contend that they must be intended beneficiaries of the 1963 contract because they "equitably own" and have a "right" to the San Luis Unit water that flows to their land, under the contract, California state water law, and several earlier reclamation cases. Pet. Br. 21, 37-40. Petitioners are wrong as a matter of law, but the Court need not decide the scope of a water user's property rights in this case, because even if petitioners had a property interest in all or part of the *res* of the 1963 contract, that would still not entitle them to sue for consequential damages on the facts of this case.

1. *Ownership Of All Or A Portion Of The Contract Res Does Not By Itself Confer Intended Beneficiary Status*

Petitioners state without meaningful explanation or analysis that their claimed ownership of the water necessary to irrigate their lands "powerfully implies" that they are intended beneficiaries of the 1963 contract. Pet. Br. 40. Even assuming *arguendo* that petitioners owned the interest they

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contract limited SBA's consequential damages liability in any way. On appeal after remand for factual development, however, the Eighth Circuit affirmed the trial court's dismissal for lack of standing and failure to state a claim, concluding that the SBA owed no contractual duty to plaintiffs. *See Audio Odyssey, Ltd. v. United States*, 373 F.3d 870 (8th Cir. 2004). Finally, in *Airplane Sales Int'l Corp. v. United States*, 54 Fed. Cl. 418 (Ct. Cl. 2002), the Navy contracted to transfer airplane parts to a museum which in turn contracted to sell those parts to plaintiff. Plaintiff was allowed to sue the Navy directly for its alleged failure to provide all parts required by the contract, but plaintiff's damages were presumably identical to those of the museum itself; and because only one individual ultimately received parts under the Navy contract, allowing a third-party suit did not subject the government to an unintended multiplicity of litigation.

claim, however, the analysis stated *supra* at 30-37 demonstrates that the contracting parties did *not* intend them to be able to sue the United States for contract damages. We are unaware of any case holding that mere ownership of the *res* of a contract automatically allows that third-party owner to sue for contract damages. Indeed, many cases deny intended beneficiary status to such owners, particularly in the context of a government contract that furthers important public purposes extending beyond the parochial economic interests of the property owners.[19]

2. *Petitioners Have No Contractual Right To Reclamation Water Under The 1963 Contract*

Petitioners' assertion of a contractual "right" to CVP water raises a merits issue more than one affecting intended beneficiary analysis, but, in either event, is incorrect. The contract provisions they cite, which prohibit distribution of water

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[19] *See, e.g., Chancellor Manor*, 331 F.3d at 901 (housing project owners were not intended beneficiaries of mortgage guarantee contract with government because "[t]he primary, direct beneficiary of the Insurance Commitment was the public"); *Castle v. United States*, 301 F.3d 1328, 1338 (Fed. Cir. 2002), *cert. denied*, 539 U.S. 925 (2003) (shareholders of savings and loan association could not sue as intended beneficiaries of contract between association and federal government regarding regulatory treatment of association's merger); *Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001) (corporate shareholders could not sue as intended beneficiaries of alleged contract between federal government and corporation regarding regulatory treatment of corporation's merger); *see also supra* n. 13.

Petitioners cite only two cases in asserting that their alleged property right is dispositive of the intended beneficiary issue. Pet. Br. 40 n. 47. Both cases involved a contract between two parties to ship a third party's property, and in neither, unlike this case, did the contract manifest an intent either to a benefit a broad array of third parties or to insulate the promisor from consequential damages. Accordingly, allowing a direct action by the lone third party in each of those cases did not turn on the ownership issue and was in no way inconsistent with the contracting parties' presumed contractual intent.

where certain prerequisites have not been satisfied, set *limitations* on the District's prerogative to deliver the water that *it* receives; they do not establish an affirmative right of certain lands or water users to such water. Article 15 merely provides that, as to lands for which payments to the District have *not* been made, "such tract shall have *no* right to any water furnished to the District pursuant to this contract." Art. 15 at JA 45 (emphasis added). Articles 23(a), 24(e), and 25(b), which implement the "excess land" provisions of the Reclamation Act, simply limit the concentration of land holdings and help to spread more widely the benefits of the reclamation program. *See supra* at 2-4. Most importantly, the negative implication that petitioners seek to derive is not supported by the contract as a whole, whose payment and delivery terms make clear that individual water users possess no "right" to receive water, even where they have fulfilled their own payment obligations to the District. *See supra* at 34.

3. *Petitioners Have No State Or Federal Property Right To Reclamation Water*

Petitioners' assertion of a state law property right in future use of CVP water is also legally mistaken. Nowhere do petitioners articulate the precise nature or contours of that supposed right. Moreover, under applicable legal principles, petitioners' rights are entirely derivative of the District's, which are themselves limited by the 1963 contract, by federal statutory mandates, and by state water law doctrines of beneficial use, reasonable use, and public trust. Whatever right petitioners may have to the continued reasonable and beneficial use of CVP water under their agreements with the District, and whatever rights the District may have to such water under its contract with the Bureau, neither petitioners nor the District have any vested property right to a fixed and perpetual quantity of CVP water, regardless of competing statutory, contractual, reasonable and beneficial use, and public trust obligations of the Bureau.

Section 8 of the Reclamation Act, *codified at* 43 U.S.C. §383, states in pertinent part:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

Under the system of "cooperative federalism" established by this provision, the Bureau must administer the reclamation program in compliance with state laws regarding appropriation of water rights, unless those laws are inconsistent with a clear congressional directive. *California v. United States*, 438 U.S. 645, 650, 668 n.21, 678 (1978). The federal reclamation scheme thus recognizes the primacy of *state* law in creating and defining legal rights to reclamation water. *Id.* at 650.

There is no dispute that the United States—rather than petitioners, other end water users, or the water districts—holds the permits and legal right to appropriate the CVP water at issue here and is the legal "water right holder" under California law. WER 232-33; *see* Cal. Water Code §1225. Indeed, California's State Water Resources Control Board ("SWRCB"), the state body in "charge of comprehensive planning and allocation of waters," *see National Audubon Society v. Superior Court*, 33 Cal.3d 419, 444, *cert. denied*, 464 U.S. 977 (1983), held in 2000, after conducting 80 days of hearings and compiling a 128,970 page record, that the United States, not any other entity, "is the water right holder" of the water at issue in this case.[20] The California Superior

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[20] Implementation of Water Quality Objective for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, California State Water Resources Control Board Revised Decision 1641, 1999 WL 1678482 at *84

Court affirmed that decision in May 2003 after a 16-day trial, reiterating the Bureau's legal title and holding that "persons who use water provided under contract with a water supplier entity, such as the Central Valley Project" were not "legal users" of water and thus not protected from changes in the Bureau's permits.[21]

SWRCB Decision D-1641 rejected the argument that the end users of CVP water are "the water right holders," while reaffirming well-established principles of California water law that long predated the 1963 contract. These principles preclude landowners from obtaining a vested right to use a fixed quantity of water in perpetuity to the detriment of other

(Mar. 15, 2000). SWRCB Decision D-1641 considered, among other things, the Bureau's application to consolidate and change the places and "purposes of use" for the Bureau's then-existing CVP water permits. D-1641 at *80. The Bureau submitted the application to confirm its authority under its state water permits to provide water allocations for fish and wildlife purposes, consistent with the requirements of the ESA. *Id.* at *80-*81. The District objected to the Bureau's application, but the SWRCB rejected the District's "argument that the end users of water are the water right holders" and concluded that the Bureau as legal owner was entitled to change its use of water under state law. *Id.* at *85. The SWRCB thus confirmed that the Bureau was entitled under California law to make the very allocations for fish and wildlife purposes that petitioners challenge in this case.

[21] *State Water Resources Control Board Cases*, Coord. Special Proc. No. JC 4118, Statement of Decision ("Proc No. JC 4118"), at 4-7, 42, 46 (Cal. Superior Ct. May 5, 2003), available at http://www.saccourt.com/CoordCases/swrcb/orders/SWRCBCaseDecision5-5-03.PDF (last visited Jan. 4, 2005). *Accord*, *County of San Joaquin v. State Water Resources Control Board*, 54 Cal. App. 4th 1144, 1156 n.12 (1997), *cert. denied*, 522 U.S. 1048 (1998); *United States v. State Water Resources Control Board*, 182 Cal. App. 3d at 106, 145. Although an appeal from that decision is pending, the California Superior Court is a court "whose decrees are regarded as determinati[ve] of state law" in cases involving water rights. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 753 n. 23 (1950) (citing *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940)).

beneficial, competing demands on the water, such as protection of fish and wildlife.[22]

In 1928, California amended its state constitution explicitly to add reasonableness and beneficial use standards to state water law:

> The right to water or to the use or flow of water in or from any natural stream or water course in the State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

Cal. Const. art. X, §2; *see also Joslin v. Marin Municipal Water Dist.*, 67 Cal.2d 132, 137 & n. 5 (1967); *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 26 Cal.3d 183, 193-97 (1980); Cal. Water Code §100 ("The right to water or to the use or flow of water . . . is and shall be limited to such water as shall be reasonably required for the beneficial use to be served . . ."). Those requirements of reasonable and beneficial use are separate and independent, so "the mere fact that a use may be beneficial . . . is not sufficient if the use is not also reasonable." *Joslin*, 67 Cal.2d at 143. "[W]hat is a reasonable use of water depends on the circumstances of each case" in light of "statewide considerations of transcen-

[22] *See National Audubon*, 33 Cal.3d at 425-26 ("the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and [underlying] lands . . . [and to] bar[] . . . any . . . party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust"); *United States v. SWRCB*, 182 Cal. App. 3d at 106 (state possesses "police power . . . to regulate the use and enjoyment of water rights for the public benefit"); *People v. Glen-Colusa Irrig. Dist.*, 127 Cal. App. 30, 36 (1932) (affirming injunction against irrigation district's operation of pumps that killed large numbers of fish); Brian E. Gray, *The Property Right in Water*, 9 Hastings W.-N.W. J. Envtl. L. & Policy 1, 9 (2002).

dent importance," including "the ever increasing need for the conservation of water in this state." *Id.* at 140. Under these principles of California law, any allocation of CVP water to petitioners was necessarily subject to ensuring the reasonable and beneficial use of that water, taking into account protection of public trust resources such as fish and wildlife. *See, e.g., National Audubon*, 33 Cal.3d at 443; Cal. Water Code §1243 ("The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water . . . .").

Petitioners' claimed "equitable" right to a consistent flow of water also rests upon the erroneous assertion that the Bureau holds legal title to the CVP water in trust for the landowners who apply the water to their lands. That "trust" theory, however, derives from an aspect of *Ivanhoe Irrig. Dist. v. All Parties and Persons,* 47 Cal.2d 597 (1957) ("*Ivanhoe I*"), that was explicitly disavowed by the California Supreme Court in *Ivanhoe Irrig. Dist. v. All Parties and Persons,* 53 Cal.2d 692, 716 (1960) ("*Ivanhoe II*"). Petitioners' trust theory was also rejected by the SWRCB in Decision D-1641 and by the Superior Court in affirming that decision. Proc. No. JC 4118, at 47-48.[23]

[23] As *Bryant v. Yellen*, 447 U.S. 352 (1980), recognized, to the extent *Ivanhoe II* acknowledged any state prescription on water allocations to landowners, that prescription arose from a narrow state statute prohibiting discriminatory allocations (which is not applicable here). *See id.* at 371 n.23. Any trust relationship recognized today under California law is a trust benefitting all people of the state, not particular landowners, as the SWRCB has concluded. D-1641, 1999 WL 1678482 at *83; *see also National Audubon,* 33 Cal.3d at 441 ("public trust . . . is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands"); *compare Ivanhoe I*, 47 Cal.2d at 620. In any event, the landowners in *Bryant* appear to have obtained their water rights long before the Bureau took over the delivery and distribution of the water and long before California's present water appropriation rules and Cal. Const. art. X, §2 were adopted. *Bryant*, 447 U.S. at 357-58 & n.4; *Arizona v. Colorado*, 373 U.S. 546, 552-53 (1963).

Any right petitioners may have to the use of CVP water arises from, and can be no greater than, the District's right to water under the 1963 contract.[24] Before the execution of the 1963 contract (and until the project became operational), petitioners and their predecessor Area I landowners received no supplemental CVP water. The Bureau later provided reclamation water to the District under the 1963 contract, but subject to the terms of that contract, including: the "beneficial use" limitation, *see* Art. 3(f) at JA 36; the provision limiting the District to a pro-rata share of water that is "available," given the government's competing contractual commitments, *see* Art. 11(a) at JA 42-43; *Westlands Water Dist.*, 337 F.3d at 1102-03; and the United States' reservation of its right to amend the reclamation laws, *see* Art. 26 at JA 53.

Petitioners' suggestion that they have a right in perpetuity to a fixed quantity of water assumes that their right, although derivative, is greater than the District's right to water under the 1963 contract. Carried to its logical extension, petitioners' "right" could entitle them to continued water delivery beyond the term of the 1963 contract and even if they refused to pay for water received. Not only does the contract create no absolute or unlimited right in the District or any other entity to a fixed quantity of water, but Article 11(a) expressly

[24] As the SWRCB noted in Decision D-1641, "[t]he water right permits held by the [Bureau] . . . recognize that deliveries of water by the [Bureau] to public agencies are subject to the contractual provisions between the [Bureau] and the public agencies." D-1641, 1999 WL 1678482 at *81 n.70; *see also* Cal. Water Code §23200 (right to use water acquired under a reclamation contract to be distributed according to federal reclamation laws and contract provisions); *accord Barcellos*, 849 F.Supp. at 731, *aff'd sub nom., O'Neill*, 50 F.3d 677; *see also* Brian E. Gray, *The Property Right in Water*, 9 Hastings W.-N.W. J. Envtl. L. & Policy at 1, 17.

absolves the United States from any liability from under-deliveries resulting from error, drought, or "*any other causes.*" Art. 11(a) at JA 42 (emphasis added); *see also O'Neill*, 50 F.3d at 689; *United States v. SWRCB*, 182 Cal. App.3d at 148 (contractual immunity provision establishes "substantively and conceptually" that the "contractors cannot justify any reasonable expectation of a certain or guaranteed water supply for delivery"); *Bowen v. Public Agencies*, 477 U.S. 41, 52-54 (1986) (no California property interest in program rights that United States reserved power to modify).

In short, state water law does not create the vested property right that petitioners believe is so central to establishing their status as intended beneficiaries. Any claim to water delivered under the 1963 contract is derivative of the District's right to water under that contract and must yield to the obligation of the United States, the holder of the water right under state law, to allocate CVP water for reasonable and beneficial uses, including fish and wildlife protection, to protect trust resources, and to adhere to statutory mandates of the ESA and CVPIA.

Nor do *Ickes v. Fox*, 300 U.S. 82 (1937), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Nevada v. United States*, 463 U.S. 110 (1983), support petitioners' asserted vested right. Pet. Br. 21. While each of those decisions acknowledged the defining role of *state* water law, none involved *California* water law, which does not confer a vested right to a perpetual water flow or to any set quantity of water. Those cases are also factually distinguishable because in each, the water rights were formally acquired by the water users in their own name from the United States or their respective states—unlike here where the United States acquired the water rights itself and owns legal title to the CVP water under

applicable state law.[25] Because petitioners in this case never perfected legal title to the CVP water or had such right confirmed by court decree, they are differently situated than the claimants in *Ickes*, *Nebraska*, and *Nevada*. Moreover, none of those cases involved the type of contract at issue here, a fixed–term water service contract under 43 U.S.C. §485h(e).[26]

Petitioners' reliance on the proviso to Section 8 of the Reclamation Act is also unavailing. That proviso reiterates the well-established principle, echoed by many states' laws, including California's, that "[t]he right to the use of water acquired under the provisions of this Act shall be *appurtenant* to the land irrigated, and *beneficial use* shall be the basis, the measure, and the limit of the right." 43 U.S.C. §372 (emphasis added). Petitioners read this proviso as creating an independent federal "appurtenancy" rule under which "water rights . . . attach to specific parcels to which water has been beneficially applied," presumably forever. Pet. Br. 40 n.44. However, the appurtenancy proviso establishes a *limitation*

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[25] In *Ickes*, landowners receiving water from the Yakima Project were required by the Bureau's contract to initiate their own water rights under Washington state law *before* construction of the Project commenced. 300 U.S. at 89. In *Nebraska*, the "state authorities . . . issued decrees and certificates in favor of the individual water users [that] named as appropriators the individual landowners"—again, before the start of construction on the Project. 325 U.S. at 613-14. In *Nevada*, "[b]efore the works contemplated by the project went into operation, a number of private landowners had established rights in the Truckee River under Nevada law." 463 U.S. at 116. Those rights were also confirmed by a court decree that was final and binding on the United States. *Id.* at 113. Each of these cases thus involved individual landowners who obtained water rights under state law *before* their land became part of a federal reclamation project.

[26] The contracts in *Ickes, Nebraska*, and *Nevada* were entered into prior to 1939, when Congress first authorized water service contracts. Reclamation Project Act of 1939, ch. 418, §9(e), 53 Stat. 1187, 1196, 43 U.S.C. §485h(e).

on the use of reclamation water after its delivery, not a guarantee of future flows. Congress included this term not to confer affirmative, prospective rights on landowners—after all, §372 on its face does not create rights, but only limits rights otherwise "acquired under the provisions of the Act"—but to further the anti-monopoly, anti-profiteering goals of the Reclamation Act by preventing subsidized reclamation project water from being separated from the actual land that it irrigated and then re-sold at a speculative profit.[27]

Congress used the term "beneficial use" to limit the permissible uses of reclamation water and to ensure a reasonable accommodation of competing interests. *See, e.g.,* H. R. Rep. No. 57-794, at 8. By making "beneficial use" "the basis, the measure, and the limit of the right [to use reclamation water]," Congress incorporated well-established state law doctrines that imposed limits on the amounts of water available for irrigation or other reclamation purposes. As then-Judge Kennedy explained in *Alpine Land & Reservoir Co.*:

> The legislative history of the 1902 Reclamation Act makes clear that the "principles underlying and governing water rights" under the Act were to be the existing beneficial use concepts of western water law. . . . While there were provisions of federal law which were intended to displace state law, such as the 160-acre limit, . . . *beneficial use itself was intended to be governed by state law.*

697 F.2d at 853-54 (emphasis added) (quoting 35 Cong. Rec. 6677 (1902) (Rep. Mondell) and citing 35 Cong. Rec. 2222 (1902) (Sen. Clark)).

[27] *See* H. R. Rep. No. 57-1468, at 6-7 (1902) ("appurtenancy" language was added to "prevent the possibility of speculative use of water rights."); H. R. Rep. No. 57-794, at 8 (1902); Joseph Sax, *Federal Reclamation Law,* §120.1 at 210 n. 42 ("appurtenance provision" tied "the water to the land" to "prevent[] speculation in water rights as such"); Paul S. Taylor, *Public Policy,* 64 Yale L.J. at 486 ("Early irrigationists had been greatly dissatisfied with dependence on others in control of their water supply, and regarded tying water and land together in common ownership as among the surest of anti-monopoly devices."); *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 858 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983) (citing legislative history) (purpose of proviso was to ensure that "appropriated water [is] applied to irrigation; it cannot be severed as a commodity for use on land to which it would not be appurtenant"). In 1992, Congress amended reclamation law to authorize recipients of CVP water to resell that water to other California water users, subject to specified conditions. *See* CVPIA, Pub. L. No. 102-575, §3405(a), 106 Stat. 4706, 4709.

The California Constitution, California Water Code, and California common law each limit the Bureau's right to water under its state-issued permit by making use of that water subject to the state law doctrines of reasonable and beneficial use and public trust. Those limitations necessarily apply as well to any derivative interests that the District or others may claim in that water. Petitioners' past use of water for irrigation purposes does not confer the future water rights they claim.

E. The *Barcellos I* Judgment Is Irrelevant To Petitioners' Claims

Petitioners finally make a series of spurious arguments based on irrelevant *Barcellos I* documents. First, petitioners quote the *Barcellos I* stipulated judgment, which "acknowledges that [the District] entered into the 1963 contract for the benefit of [Area I] and the lands therein." JA 111; *see* Pet. Br. 46-48; Pet. App. 16a & n.7, 37a-38a. But nothing in that judgment expressed any such acknowledgment by the Bureau, nor would that *post hoc* expression of intent be any more binding than the present position of the two contracting parties that petitioners are not intended beneficiaries. *See Restatement* §302, comment d (requiring "manifestation of intention by the promisee and promisor"). Moreover, in the context of *Barcellos I*—a suit to assert higher priorities over other water users within the District, *see* 491 F. Supp. at 265—this statement merely acknowledges that the Area I landowners were entitled to priority in relation to other water

users, not that the District and the Bureau intended individual landowners to bring direct consequential damages actions under the 1963 contract. Further, because petitioners' present claim seeks consequential damages, they must establish more than an intent by the contracting parties to benefit them generally.

Petitioners next rely on the enforcement clause of the *Barcellos I* stipulated judgment. However, that clause simply authorized the parties to bring a motion or new action "for the *sole* purpose of seeking an order directing the Federal parties to *perform* in accordance with the express terms of this Judgment." JA 110 (emphasis added). Petitioners here do not seek specific performance, and expressly conceded below that they "are here for money damages retroactively. . . . We are not trying to specifically enforce—perform anything. We are not trying to enforce the judgment." WER 239.

Finally, petitioners argue that the stipulated judgment itself constitutes a contract under §390uu. However, petitioners do not seek to enforce that judgment in this case. Besides, ¶23 of that judgment provides: "Neither this Judgment nor the Stipulation for Compromise Settlement is a contract or an amendment to a contract with the United States as described in Section 203(a) of the 1982 [Reclamation Reform] Act." Pet. App. 16a; JA 146. Section 203(a) of that Act, which is codified at 43 U.S.C. §390cc, states that "[t]he provisions of this title"—which include 43 U.S.C. §390uu (enacted as Section 221 of the 1982 Act)—apply to districts that have entered into or amended one of the types of "contract[s]" designated in §390cc. By specifying that the judgment does not constitute a "contract" within the meaning of §390cc, the judgment made §390uu inapplicable to its enforcement.

CONCLUSION

For the reasons stated, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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In The Supreme Court of the United States

FRANCIS A. ORFF, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Respondent Westlands Water District addresses the following question presented by this case:

Whether the court below correctly determined that the Petitioner landowners within Westlands Water District are not intended third-party beneficiaries of Westlands' 1963 water service contract with the United States, and that the United States has not waived its sovereign immunity pursuant to 43 U.S.C. § 390uu against the landowners' claims that the United States breached the 1963 contract.

CORPORATE DISCLOSURE STATEMENT

Respondent Westlands Water District has no parent corporation or a nonwholly owned subsidiary.

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Bettina Boxall, L.A. Times, *U.S. to Pay $16 Million in Water Rights Case*, Dec. 22, 2004, at Part B, Page 1 47

Hutchins, *The California Law of Water Rights*, 100 (1956) 13

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STATEMENT OF THE CASE

This case involves assertions by various landowners within Westlands Water District ("Westlands") that they are intended/direct beneficiaries to a 1963 Water Service Contract ("1963 Contract") between Westlands and the United States. The landowners, who are Petitioners, assert that this third-party status is sufficient to defeat the United States' assertions of sovereign immunity in its breach of contract and declaratory relief action against the United States. The Petitioners seek damages from the United States due to the United States' failure to meet its contractual water delivery commitments to Westlands. The Petitioners depend upon this water to sustain their farming activities, and therefore assert that the United States' failure to deliver this water to Westlands harmed them.

The backdrop against which this dispute has played out is the massive Central Valley Project ("CVP"). The CVP is the largest federal water management project in the United States. *Westlands Water District v. United States*, 337 F.3d 1092, 1095 (9th Cir. 2003); *see generally Dugan v. Rank*, 372 U.S. 609, 612 (1963);[1] *Ivanhoe Irrigation District*

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[1] The grand design of the Project was to conserve and put to maximum beneficial use the waters of the Central Valley of California, . . . comprising a third of the State's territory, and the bowl of which starts in the northern part of the State and, averaging more than 100 miles in width, extends southward some 450 miles. The northern portion of the bowl is the Sacramento Valley, containing the Sacramento River, and the southern portion is the San Joaquin Valley, containing the San Joaquin River. The Sacramento River rises in the extreme north, runs southerly to the City of Sacramento and then on into San Francisco Bay and the Pacific Ocean. The San Joaquin River rises in the Sierra Nevada northeast

(Continued on following page)

v. McCracken, 357 U.S. 275, 279-84 (1958); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 726-31 (1950). Although initially planned and envisioned by the State of California, the United States took over and began developing the CVP in 1935 pursuant to the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (June 17, 1902), as amended by Pub. L. No. 66-212, 41 Stat. 605 (May 20, 1920). *See Westlands Water District v. United States*, 337 F.3d at 1095. As summarized by the Ninth Circuit,

> The CVP's purpose is to "improv[e] navigation, regulat[e] the flow of the San Joaquin River and the Sacramento River, control[] floods, provid[e] for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy." Act of August 26, 1937, Pub. L. No. 75-392, 50 Stat. 844, 850. To accomplish the project's purposes, CVP's construction includes a series of many dams, reservoirs, hydro-power generating stations, canals, electrical transmission lines, and other infrastructure. *Gerlach Live Stock, Co.*, 339 U.S. at 733.

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of Fresno, runs westerly to Mendota and then northwesterly to the Sacramento-San Joaquin Delta where it joins the Sacramento River. The Sacramento River, because of heavier rainfall in its watershed, has surplus water, but its valley has little available tillable soil, while the San Joaquin is in the contrary situation. An imaginative engineering feat has transported some of the Sacramento surplus to the San Joaquin scarcity and permitted the waters of the latter river to be diverted to new areas for irrigation and other needs.

Dugan v. Rank, 372 U.S. at 612.

Westlands Water District v. United States, 337 F.3d at 1095-96; *see also California v. Sierra Club*, 451 U.S. 287, 291 (1981) ("[T]he Central Valley Project[] is designed in part to provide a constant source of water for irrigation to the Central Valley of California.").

The United States Bureau of Reclamation (hereinafter either "Bureau" or "Reclamation"), a division of the Department of the Interior, operates the CVP, including diverting and storing water from various sources and delivering it to contract holders for beneficial use. *Westlands Water District v. United States*, 337 F.3d at 1096. The California State Water Resources Control Board ("SWRCB") grants the permits for water appropriation for the CVP. *Id.* at 1096.

Westlands is a local governmental entity formed under and governed by Division 13 of the California Water Code, known as the "California Water District Law." Cal. Water Code § 34000 *et seq.* Westlands purchases water from the Bureau pursuant to the 1963 Contract, a CVP water service contract. *See* Joint Appendix ("J.A.") 30-61. In particular,

> Westlands is a California water district located within Fresno and King[s] Counties. In 1963, Westlands entered into a contract with the Bureau for water from the San Luis Unit of the CVP, which diverts water from the Sacramento-San Joaquin River Delta via the Delta-Mendota Canal. Westlands is the largest contractor for water from the San Luis Unit [citation omitted] with a contractual entitlement to purchase 900,000 acre feet of water annually. . . .

Westlands Water District v. United States, 337 F.3d at 1097. As recognized by the court below, "[t]he validity and

enforceability of the 1963 contract was upheld in 1986 pursuant to a Stipulated Judgment in *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, (E.D. Cal.) (No. CV 79-106-EDP) ("*Barcellos*"), which resolved litigation that arose out of the government's assertion in 1978 that the 1963 contract was invalid. The *Barcellos* judgment required the government to perform the 1963 contract." Pet. App. 3a.

Petitioners are landowners within Westlands who have received water from the Bureau since the late 1960's and early 1970's. 1 E.R. 141; *see also* 1 E.R. 37[2] ("The . . . [Petitioner landowners] own and operate in the aggregate approximately 60,000 acres of farmland located in . . . [an area] of the District."); *O'Neill v. United States*, 50 F.3d 677, 680 (9th Cir. 1995) (discussing historical delivery of water to landowners within an area of Westlands).

A. Proceedings in This Case

The present case "is another in a long line of cases involving the Central Valley Project. . . . " Pet. App. 2a.[3] Westlands commenced this litigation in 1993 by filing its complaint for damages and injunctive relief against the Bureau and other defendants. 1 E.R. 1. Various parties

[2] Westlands filed two volumes of Excerpt of Record with the 9th Circuit. Citations from those two volumes will hereinafter be referenced as "1 E.R." or "2 E.R."

[3] *See, e.g., Westlands Water District v. U.S. Department of Interior*, 376 F.3d 853 (9th Cir. 2004); *Westlands Water District v. United States*, 100 F.3d 94 (9th Cir. 1996); *O'Neill v. United States*, 50 F.3d 677; *Westlands Water District v. Natural Resources Defense Council*, 43 F.3d 457 (9th Cir. 1994); *Westlands Water District v. Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993); *Barcellos and Wolfsen, Inc. v. Westlands Water District*, 899 F.2d 814 (9th Cir. 1990); *Westlands Water District v. United States*, 700 F.2d 561 (9th Cir. 1983).

intervened in the litigation, including the Petitioners, who were allowed to intervene as plaintiffs. 1 E.R. 21; *see generally Westlands Water District v. United States*, 850 F.Supp. 1388, 1393-99 (E.D. Cal. 1994). The litigation, itself, was predicated upon the impacts of the Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4600 (Oct. 30, 1992) (hereinafter "CVPIA") and related actions. These circumstances affected Westlands and its landowners through the reallocation of water from intended uses within Westlands to general environmental purposes, and through the substantial increase in the per-acre-foot cost of CVP contract water.

Subsequent to the filing of this case, the United States, the State of California, and various "stakeholders," including Westlands, entered into negotiations to address the broad water supply and environmental issues emanating from the enactment of the CVPIA and related issues. These circumstances had, among other things, given rise to the litigation. On December 15, 1994, Principles for Agreement on San Francisco Bay-Delta Water Quality Standards Between the State of California and the Federal Government were entered into. This Agreement, coupled with other related developments that addressed some of the most significant issues that had prompted Westlands to initiate the original underlying lawsuit, resulted in Westlands filing a motion seeking dismissal of its action without prejudice. 1 E.R. 138-39. The district court granted Westlands' motion to dismiss and designated the Petitioner landowners as "Plaintiffs" in future proceedings. 1 E.R. 29. The Petitioners then filed a Second Amended Complaint including allegations that the United States violated their statutory and contractual rights in failing and refusing to deliver water to them. 1 E.R. 49.

The Petitioners ultimately sought damages based on federal reclamation law, trust law, state water rights law and contract law.[4] 1 E.R. 197-98.

In response, the United States argued that the Petitioner landowners lacked standing to assert such rights since they did not have a contractual relationship with the United States. 1 E.R. 198. By an opinion issued in June 1998 (1 E.R. 186), the district court initially rejected this argument and ruled that the Petitioners could assert contractual rights as third-party beneficiaries to Westlands' 1963 Contract. 1 E.R. 203. Based on its determination of the Petitioners' status, the district court found that it had subject matter jurisdiction, and proceeded to rule on the state appropriative water rights and trust claims. 1 E.R. 203, 204, 231 & 233. Those claims, the district court held, were dependent on the 1963 Contract and could not be asserted independently from that contract. 1 E.R. 223 & 233. The district court also dismissed for lack of subject matter jurisdiction all claims not arising under the 1963 Contract. 1 E.R. 217.[5]

After the district court issued its June 1998 Opinion and Order, the Ninth Circuit Court of Appeals issued its opinion in *Klamath Water Users Protective Assoc. v. Patterson,* 204 F.3d 1206 (9th Cir. 1999), *cert. denied*, 531 U.S.

[4] The Petitioner landowners also asserted claims for rescission of the 1963 Contract based on the United States' alleged breach of contract and claims arising from surcharges imposed under section 3407 of the CVPIA. 1 E.R. 198.

[5] Upon Westlands' special appearance, the district court granted Westlands' motion to modify the June 5, 1998 Opinion and Order. 1 E.R. 306. Accordingly, the district court struck from its June 1998 Opinion and Order the sentence: "Any judgment will bind Westlands and Westlands' members, including Plaintiffs." 1 E.R. 306.

812 (2000) ("*Klamath*"). In *Klamath*, the Ninth Circuit held that irrigators in the United States' Klamath Project are not intended third-party beneficiaries of a contract between a dam operator and the Bureau of Reclamation. *Id.* at 1211. The *Klamath* decision prompted the United States to seek reconsideration of the district court's ruling according the Petitioners the status of third-party beneficiaries under the 1963 Contract. Pet. App. 26a-27a.

The district court reconsidered its earlier determination of the Petitioners' status in light of the *Klamath* decision, reversed its earlier finding, and ruled that the Petitioners were not intended third-party beneficiaries of the 1963 Contract. Pet. App. 45a. The district court concluded that, therefore, the Petitioners lacked standing to bring their contract claims before the court. Pet. App. 34a. Accordingly, it dismissed the Petitioners' contractual claims for lack of subject matter jurisdiction. Pet. App. 46a.[6]

On August 11, 2000, the district court entered its Final Judgment in the underlying case, ruling that the Petitioners were not intended third-party beneficiaries of

[6] The court did provide the Petitioners 10 days in which to notify the court whether they wished their money damages claims transferred to the Court of Claims. Pet. App. 46a. Upon the Petitioners' request to vacate the April 12, 2000 memorandum opinion, the court declined the request to vacate, but did give the Petitioners five days in which to notify the court whether they wished the case transferred to the Court of Claims. 2 E.R. 352. The Petitioners did not so notify the court, and the district court's Final Judgment concluded: "Since April 2000, Plaintiffs have been given three opportunities to have the case transferred to the Court of Claims. Each time, they have objected by purporting to impose unilateral conditions on any transfer. The reargument and objections by Plaintiffs are OVERRULED." Pet. App. 22a.

the 1963 Contract and that the district court lacked subject matter jurisdiction. Pet. App. 21a-22a. Notwithstanding the dismissal and determination that the district court lacked subject matter jurisdiction on the contractual claims, the district court ultimately entered Final Judgment in favor of the United States on the merits of the Petitioners' water rights and trust claims. Pet. App. 21a-22a. The Petitioners appealed and Westlands intervened out of concern that its rights could be affected. Pet. App. 5a.

In the decision now before the Court, the Ninth Circuit upheld the district court's conclusion that *Klamath* compelled dismissal of the Petitioners' action. The Ninth Circuit confirmed its prior articulation of a rule that in dealing with the question of intended third-party beneficiary status with respect to Reclamation contracts, a clear intent to provide such status must be evidenced within the language of the contract. In this regard, the Ninth Circuit refused to look at the history and circumstances surrounding the contract. Pet. App. 17a. In addition, due to the district court's lack of jurisdiction, the Ninth Circuit concluded that it must "vacate as nullities the district court's rulings on the merits of the appropriative water rights, trust, and surcharge claims." Pet. App. 18a. Given the lack of subject matter jurisdiction, the Ninth Circuit expressly noted: "we have had no need to explore the merits of those claims." Pet. App. 19a.

B. Historical Background: The California Water Rights System and Federal Reclamation Law

The Bureau is like any other applicant for water and water rights in California and can only obtain rights to

divert and deliver water within Reclamation projects through the application of relevant provisions of state law. *California v. United States*, 438 U.S. 645, 652, 653 n.7, 678 (1978). California's water right system is a hybrid system, recognizing both riparian[7] and appropriative[8] water rights. *People v. Shirokow*, 26 Cal.3d 301, 307 (1980). It bears emphasis that both types of water right are usufructuary in nature, which is a right to the *use* of the water as opposed to the *corpus* of the water. *Kidd v. Laird*, 15 Cal. 161, 180 (1860); *State of California v. Superior Court of Riverside County*, 78 Cal.App.4th 1019, 1032 (2000).[9] Specifically, Cal. Water Code § 102 provides that "[a]ll water within the State is the property of the people of the State, but the right to the *use* of the water may be acquired by appropriation in the manner provided by law." (Emphasis added.)

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[7] Upon statehood, California adopted the common law of England, thereby incorporating the riparian doctrine. *United States v. State Water Resources Control Board*, 182 Cal.App.3d, 82, 101 (1986). The riparian doctrine confers upon the owner of land, adjacent to a water course, the right to divert the water flowing in that watercourse for use on riparian lands. *Id.* All riparians share in common ownership in the water course and, in times of shortage, must reduce usage proportionately. *Id.* With limited exception, appropriative rights are subordinate to riparian rights such that in times of shortage, riparians are entitled to fulfill their needs before appropriators are entitled to any water. *Id.* at 101-102, citing *Meridian, Ltd. v. San Francisco*, 13 Cal.2d 424, 445-47 (1939).

[8] *Colorado v. New Mexico*, 459 U.S. 176, 179 n.3 (1982) ("Under the prior appropriation doctrine, recognized in most of the western states, water rights are acquired by diverting water and applying it for a beneficial purpose.")

[9] *See also United States v. Gerlach Live Stock Co.*, 339 U.S. at 745 (in discussing the development of the riparian rights doctrine, this Court noted that "the law followed the principle of equality which requires that the corpus of flowing water become no one's property. . . .")

For the operation of the CVP, the United States, by and through the Bureau, obtained only permits for appropriative water rights. In California, there are two distinct categories of appropriative water rights: pre-1914 rights and rights obtained through a permit procedure. Pre-1914 appropriative water rights are those appropriative water rights initiated prior to California's Water Commission Act of 1913.[10] Prior to 1914, one could acquire appropriative water rights either by diverting and putting water to beneficial use[11] or by posting notice, taking water from the source, and applying it to some beneficial use. *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 102. The right obtained was a right appurtenant to the

[10] In 1913, the California Legislature enacted the Water Commission Act. Stats. 1913, ch. 586. The Water Commission Act was codified in 1943 as Division 2 of the California Water Code. Today, and since 1914, any person or entity seeking an appropriative water right is required to file an application to appropriate water with the SWRCB. *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 102.

[11] In order for a "use" of water to be appropriative, it must be "beneficial." The "beneficial use," not just "use," is always the measure of an appropriative water right. Beneficial uses include domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, and mining and power purposes, among others. Cal. Water Code § 1257; Cal. Code Regs. tit. 23, §§ 659-672. In California, since 1928, a beneficial use must also be "reasonable" in order for it to support an appropriative right. The California constitution provides that the right to water is "limited to such water as shall be reasonably required for the beneficial uses to be served. . . . " Cal. Const. art. X, § 2. The rule enunciated in this constitutional provision applies to riparian and appropriative rights alike. *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 106, citing *Peabody v. City of Vallejo*, 2 Cal.2d 351, 383 (1935).

lands identified in the notice as being within the place of use.[12]

Subsequent to 1914, one could no longer obtain a water right through mere notice and use but, rather, one needed to instead file an application for the appropriation of water with the State of California. This new statutory scheme provided the exclusive method for acquiring appropriative water rights in California. Cal. Water Code § 1225; *Crane v. Stevinson*, 5 Cal.2d 387, 398 (1936); *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 102. Under this statutory scheme, one who seeks to appropriate water files an application with the SWRCB seeking a permit to authorize the construction of the works necessary for the diversion of the water and the taking and use of water sought therein. *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 102. Once the SWRCB issues the permit, the permit holder has the right to take and use water in accordance with the permit. Cal. Water Code § 1381; *United States v. State Water Resources Control Board*, 182 Cal.App.3d at 102.

Upon compliance with the permit terms, the SWRCB issues a license, which is the "final document" in the process, confirming the appropriative right acquired.

[12] Indeed, the very concept that appropriative water rights are real property in California stems from the proposition that appropriative water rights are incidental and appurtenant to land. *See Inyo Consolidated Water Co. v. Jess*, 161 Cal. 516, 520 (1911); *Palmer v. Railroad Commission*, 167 Cal. 163, 173 (1914). That appropriative water rights are appurtenant to land distinguishes them from property rights that are held "in gross." Rights held in gross are generally those that are "neither appendant nor appurtenant to land," but instead "annexed to a man's person." Black's Law Dictionary 782 (6th ed. 1994).

United States v. State Water Resources Control Board, 182 Cal.App.3d at 102. The actual water right, however, is perfected only by actual use on the lands identified within the permit as the place of use, and within a reasonable time of the granting of the permit, assuming the exercise of due diligence. Cal. Water Code §§ 1396, 1397. The date of priority relates back to the date that the application was accepted by the State. Cal. Water Code §§ 1450, 1455. The right obtained through the statutory process remains a right appurtenant to the lands comprising the place of use identified in the permit/license.[13] While an appropriative right, unlike a riparian right, can be separated from the land to which it was initially attached, this can be done only pursuant to the process set forth within the California Water Code. Cal. Water Code § 1702 (before a change can be approved the SWRCB must find "that the change will not operate to the injury of any legal user of the water involved.").

The appropriative right becomes appurtenant to the land on which the water is used. *Wright v. Best*, 19 Cal.2d 368 (1942); *Inyo Consolidated Water Co. v. Jess*, 161 Cal. at 520; *Tulare Irr. Dist v. Lindsay-Strathmore Irr. Dist*, 3 Cal.2d 489, 546-47 (1935); *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 25-26 (1929); *Senior v. Anderson*, 138 Cal. 716, 723 (1903). The appurtenancy requirement means that the measure of the water right itself relates directly to actual beneficial use on specified lands for specified

[13] An application to appropriate water requires the identification of, among other things, a "place of use" of the water sought to be diverted. Cal. Water Code § 1260(f). Where the holder of an appropriative water right seeks to change the place of use of the water diverted, the holder must file a petition with the SWRCB requesting the change. Cal. Water Code § 1701.

purposes. "An appropriator's right is limited to such quantity . . . as he may put to a useful purpose upon his land within a reasonable time, by use of reasonable diligence. . . . " *Felsenthal v. Warring*, 40 Cal.App. 119, 133 (1919). *See also Smith v. Hawkins*, 120 Cal. 86, 87 (1898); *Crane v. Stevinson*, 5 Cal.2d 387; *California Water Service Co. v. Edward Sidebotham & Sons, Inc.*, 224 Cal.App.2d 715, 727 (1964). A permit is not an appropriative water right. Indeed, an appropriation is incomplete and there is no vested "water right" unless and until waters have been put to beneficial use. *Madera Irr. Dist. v. All Persons*, 47 Cal.2d 681, 688-91 (1957), *reversed on other grounds sub nom. Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); Hutchins, *The California Law of Water Rights* 100 (1956). The permit bestows a privilege; beneficial use gives rise to a right.

The law in most of the Reclamation States, regarding the appurtenant nature of water rights, is similar to the law in California. At its heart is a requirement that a right to use water be perfected through actual use for specified purposes on specified lands.[14] The right acquired is a real

[14] *See, e.g.*, Or. Rev. Stat. § 540.510(l) ("all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used. . . . "); Nev. Rev. Stat. § 533.040(l) (" . . . any water used in this state for beneficial purposes shall be deemed to remain appurtenant to the place of use."); N.M. Stat. § 72-1-2 (" . . . all waters appropriated for irrigation purposes, except as otherwise provided by written contract between the owner of the land and the owner of any ditch, reservoir or other works for the storage or conveyance of water, shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water . . . "); Ariz. Rev. Stat. § 45-141(B) (" . . . [a]n appropriator of water is entitled to beneficially use all of the water appropriated on less than all of the land to which the water right is appurtenant . . . "); Idaho Code § 42-101 (" . . . such [water] right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied . . . ");

(Continued on following page)

property right and is incidental and appurtenant to these specified lands. *Fudicar v. East Riverside Irr. Dist.*, 109 Cal. 29, 36-37 (1895); *San Francisco v. County of Alameda*, 5 Cal.2d 243, 247 (1936); *Locke v. Yorba Irr. Co.*, 35 Cal.2d 205, 211 (1950).

Congress chose to adopt this rule of Western water law for Reclamation projects. Section 8 of the 1902 Reclamation Act, definitively interpreted by this Court in *California v. United States*, 438 U.S. 645, provides as follows:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof, [*Provided, T*]*hat the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*

Pub. L. No. 57-161, 32 Stat. 388, 390 § 8 (June 17, 1902) (codified as amended at 43 U.S.C. §§ 372, 383) (emphasis

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Wash. Rev. Code § 90.03.240 ("Upon the final determination of the rights to the diversion of water it shall be the duty of the department to issue to each person entitled to the diversion of water by such determination, a certificate under his official seal, setting forth . . . the land to which said water right is appurtenant . . . ").

added). Reclamation law, therefore, just like State law, requires that a right to water be limited to beneficial use on appurtenant lands.

These fundamental concepts of Western and Reclamation water law drove the early contracting for water under the Reclamation Act of 1902. In those early situations, a farmer/landowner would "enter" onto lands with the intent of either homesteading or otherwise perfecting a grant of land. Assuming compliance with all of the provisions within the underlying statutory provisions associated with the grant or patent, the patent would issue. *See, e.g.*, Act of August 9, 1912, ch. 278, 37 Stat. 265; Act of February 15, 1917, ch. 71, 39 Stat. 920. In those situations the grant would include a right to Reclamation project water, which would be appurtenant to lands to which it had been previously applied for beneficial use. *See, e.g.*, Act of August 9, 1912, ch. 278, 37 Stat. 265. That right was usually perfected through a contract between the farmer/landowner and the United States. *See, e.g.*, Act of August 9, 1912, ch. 278, 37 Stat. 265; Act of February 15, 1917, ch. 71, 39 Stat. 920. To the extent a district or association was involved, prior to 1926, its role was generally limited to the operation of facilities and the collection of fees to pay for operation and maintenance of these facilities. The perfection of the water right, in many of these cases, predated the formation of the district or association or otherwise proceeded under laws that may be different from those at issue in this case. In those situations the landowner might hold a more direct interest in the underlying vested right to water, with a district's interest dependent

on state law considerations and other relevant circumstances.[15]

Since 1926, by statute, a contract between Reclamation and an irrigation district organized under state law has been a prerequisite to delivery of water by any new Reclamation project. 43 U.S.C. § 423e. This change in the law resulted from a financial crisis that faced a number of Reclamation projects in the early 1920's. A 1924 "fact finder's report" commissioned by Congress described the nature of the difficulties facing early Reclamation projects. *See* S. Doc. No. 68-92 (1924) ("Report"). Among the problems noted were: underestimates of construction costs, inadequate consideration of whether the crops produced could support the costs of construction, farmers' inexperience with irrigation, locating projects based on politics instead of feasibility, unrealistic payment schedules, failure to calibrate repayment with the relative productivity of soils in different areas, and a depression in the farm economy. Report at xi-xiv. The Report proposed reforms to address these problems.

One such reform was an increased role for local irrigation districts or water users' associations. Report at

[15] The water rights associated with some of the districts which have filed as *amicus curiae* on behalf of Petitioners, including those on the Klamath Project, may well have developed in the manner outlined above. The rights of individual landowners and farmers in these situations were dealt with in *Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); and *Nevada v. United States*, 463 U.S. 110 (1983). Those cases did not deal with the rights of the landowners vis-à-vis their respective water districts. As with the water rights and parties involved here, the relationship between water rights, districts and landowners involves consideration of provisions of state law and historical circumstances that are not necessarily uniform in all situations.

103-108. The Report's authors believed that local control would encourage a sense of local responsibility, as well as increase efficiency. Thus, the Report observed:

> Not a few of the ills which have beset the Federal irrigation projects may be traced to the feeling that they are essentially governmental ventures for which the farmer has little or no responsibility, and that in any event the Government will protect the farmer from serious consequences, even of his own neglect. The management of all projects should be turned over to water users' associations just as soon as two-thirds of the units under the project, or division of a project, have been covered by water contracts with the Federal Government.

Report at 106. The Report discussed the differences between an irrigation district and a water users' association, but found that both forms could be useful in addressing the problems of Reclamation projects. Report at 107. It noted as the key difference that "all the lands belonging to the district are jointly liable for the project debts," and that generally a district may impose a tax to collect project costs from all lands in the district. *Id.*

The Report included proposed legislation which, among other things, provided "[t]hat hereafter no moneys shall be expended for construction on account of any new project or any new division of a project until an appropriate repayment contract, in a form approved by the Secretary, shall have been properly executed by a district or districts organized under State law, embracing the lands irrigable thereunder. . . . " Report at 205.

On December 5, 1924, Congress adopted the Second Deficiency Act, 1924 ("Fact Finders' Act"), ch. 4, 43 Stat.

672, 702 (codified at 43 U.S.C. § 500), providing, *inter alia*, that as a condition of receiving various benefits of that legislation including debt relief, a water users' association or irrigation district must assume responsibility for the "care, operation and maintenance of all or any part of the project works . . . " and that "thereafter the United States, in its relation to [the] project, shall deal with a water users' association or irrigation district. . . . " 43 U.S.C. § 500.

In 1926, Congress enacted further reforms in the Omnibus Adjustment Act, Pub. L. No. 69-284, 44 Stat. 636 (May 26, 1926) ("1926 Act"), aimed at the "rehabilitation of the several reclamation projects and the insuring of their future success by placing them upon a sound operative and business basis." 44 Stat. 650, 43 U.S.C. § 423f. In particular, section 46 of that Act required that Reclamation's future dealings concerning deliveries of water would be through contracts with irrigation districts organized under State law:

> No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, . . .

1926 Act, 44 Stat. 636, 649; Act of July 11, 1956, 70 Stat. 524 (codified at 43 U.S.C. § 423e).[16]

This irrigation district contracting requirement addressed the concerns articulated in the "Fact Finder's Report" in two ways. First, it placed distance between the federal government and the individual farmer, and thereby diminished the adverse consequences of federal "paternalism." Report at 6; 43 U.S.C. § 500. Second, the district contract requirement enhanced the prospects for repayment of Reclamation funds used for costs of construction. An irrigation district (or a water district) may collect the costs as a tax on the lands benefited. Liability is joint, so repayment does not depend on the success of each farmer. Report at 107. Instead, the repayment risk is spread over many farmers by means of "a 'firm' contract . . . with a responsible irrigation district or other local public or semi-public organization." *United States v. 277.97 Acres of Land*, 112 F.Supp. 159, 164 (S.D. Cal. 1953). Requiring landowners to deal with the United States through a district as the contracting entity thus was perceived to place and maintain the projects "upon a sound operative and business basis." *Id.* at 163.

The United States obtains its right to divert water for Reclamation projects pursuant to state law and the use of water must comport with state law unless state law is

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[16] Another section of the Act, codified at 43 U.S.C. § 423d, provided for a transition for contracts already in effect, by requiring, as a condition precedent to the execution of amendments to existing contracts, the execution of a repayment contract by a water users' association or irrigation district.

inconsistent with congressional directives.[17] *California v. United States*, 438 U.S. 645. Since, under state law, water is appropriated for specific use on specific lands and the right to water is appurtenant to those lands for those uses, the United States cannot, without a change in its basic water rights, modify either the place or purpose of use of water.

While the United States acquires and may be identified as having nominal interest in the water rights for many Reclamation projects, such water rights would not exist without the actions of the districts (such as Westlands) and their landowners, taken in reliance on the dependability of the project supply. A water right cannot be acquired and perfected merely by building dams and canals. More is required: the physical act of putting water to beneficial use.[18] Thus, the water rights for the CVP could not have been perfected if the water districts and irrigation districts had not delivered the water pursuant to California law, and had that water not been put to beneficial use. As a consequence, the water acquired by the

[17] The decision of the Ninth Circuit in *Israel v. Morton*, 549 F.2d 128 (9th Cir. 1977), finding that the United States "owned" Reclamation water rights was premised on the mistaken concept that the United States did not have to comply with state law in obtaining and maintaining water rights for Reclamation projects. Since *Israel*, however, this Court in *California v. United States*, 438 U.S. at 678-79, has determined that the United States must comply with state water law unless that law, as applied, is inconsistent with congressional directives. Thus, *Israel* cannot be read to justify the United States ignoring the interests of others in the use of the water.

[18] Indeed, prior to 1913 in California, the act of putting water to beneficial use was *all* that was required for a valid appropriation of water. *Tulare Water Co. v. State Water Commission*, 187 Cal. 533, 536 (1921); *Utt v. Frey*, 106 Cal. 392, 395 (1895); *DeNecochea v. Curtis*, 80 Cal. 397 (1889).

United States for Reclamation projects becomes appurtenant to lands within a district that is within the place of use for which it was appropriated.

Here, the underlying water rights permits for the Central Valley Project were granted by the State of California in accordance with SWRCB Water Rights Decisions 893, 990 and 1020.[19] These decisions specify that the water rights issued by the relevant permits were granted for the benefit of the public water agencies (including Westlands) for irrigation within the districts. Moreover, these decisions indicate that the right granted is a permanent right (subject to certain terms and conditions) to the use of all water appropriated and beneficially used under the permits issued, and that the right is appurtenant to the land to which the water is applied. SWRCB D 893 provides:

> The right to divert and store water and apply said water to beneficial use . . . is granted to the United States as Trustee for the benefit of the public agencies of the State together with the landowners and water users within such public agencies as shall be supplied with the water appropriated. . . . [S]uch public agencies, on behalf of their landowners and water users, shall

[19] SWRCB Decision D 893 (March 18, 1958); SWRCB Decision D 990 (February 9, 1961); SWRCB Decision D 1020 (June 30, 1961). SWRCB D 1020 resulted from Application 15764, which was originally filed by Westlands and assigned to Reclamation. 1 E.R. 140. The assignment was made after Reclamation guaranteed to Westlands that "[a] permanent water supply for [Westlands] will, of course, be assured and made available pursuant to a long term contract, renewable in accordance with the current provisions of Reclamation Law." Letter from Reclamation to Jack W. Rodner, Manager of Westlands (September 28, 1960); *see also* 1 E.R. 229.

> . . . have the permanent right to the use of all water appropriated and beneficially used . . . which right . . . shall be appurtenant to the land to which said water shall be applied. . . .

SWRCB D 893, ¶¶ 15, 16 at 72-73.[20]

This statement of rights arising under California law is consistent with federal law, including the Reclamation Act of 1902, which provides that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372.[21]

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[20] *See also* SWRCB D 990, ¶ 29; SWRCB D 1020, ¶¶ 13(a) & (b) at 23.

[21] The significant property interests held by Westlands for the ultimate benefit of its landowners in the water at issue are confirmed by this Court's prior decisions. For example, in *Nevada v. United States*, 463 U.S. 110, 124-26 (1983), this Court, citing from numerous prior Court decisions, emphasized as follows:

> . . . [I]t long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by expressed provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.
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> * * *
>
> . . . The Government's "ownership" of the water rights was at most nominal; the *beneficial interest* in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

Id. (emphasis added).

SUMMARY OF ARGUMENT

It is not possible to set forth a "one-size-fits-all" rule which will determine the intended third-party beneficiary status of landowners under all contracts between water districts and the Bureau of Reclamation. The analysis of intended third-party beneficiary status under the 1963 Contract depends upon the specific contract language at issue and on the facts, history and circumstances surrounding the transaction.

Petitioners argue that the court below erred in the manner in which it analyzed their status under the 1963 Contract between Westlands and the United States. Westlands agrees that the court below did err in focusing solely on the specific language of the 1963 Contract in an effort to determine if it evidenced a clear intent to confer intended third-party beneficiary status on Petitioners. But it nonetheless reached the correct result. Had the court looked at the surrounding facts, history and circumstances of the 1963 Contract, the correct conclusion that it reached would have rested on a much stronger footing than does its current opinion.

In this regard, the court below should have looked at the general history of Reclamation law, including provisions of Reclamation law that specifically provide that Reclamation contracts shall be with districts, such as Westlands, or water user associations and not with individual farmers and landowners. A determination that a landowner/farmer has intended third-party beneficiary status would significantly undermine the statutory objective of requiring Reclamation to contract with districts rather than with individuals.

California law is also relevant to this inquiry and should have been considered. That law, while recognizing the fundamental requirement that a right to water is created by actual beneficial use, nonetheless does not vest any ownership interest in the right to water that emanates from the 1963 Contract with individual landowners or farmers. Applicable California law leaves it to Westlands to allocate this water to individual landowners and farmers. Westlands' water rights are held for the benefit of all of the lands within the districts and cannot be reduced to the individual "ownership" of any one landowner or group of landowners, including the Petitioners.

California law also precludes individual landowners, including Petitioners, from collaterally attacking governmental decisions made by Westlands through their assertion of intended third-party beneficiary status. If Petitioners feel that Westlands is not properly acting to protect the district's 1963 Contract rights, then they are free to directly challenge district decisions in various ways expressly provided for in the California Code of Civil Procedure and California Government Code.

For these reasons, the court's decision that the 1963 Contract did not confer intended third-party beneficiary status on Petitioners should be affirmed.

Even if that conclusion were incorrect, because Petitioners are not the "contracting entity," as that term is used in 43 U.S.C. § 390uu, the court below should have also concluded that the provisions of that statute do not waive sovereign immunity. The inapplicability of the waiver of sovereign immunity to suits by intended

third-party beneficiaries provides an entirely independent basis to dismiss the action.

ARGUMENT

THE COURT BELOW PROPERLY AFFIRMED THE DISMISSAL OF PETITIONERS' CASE FOR LACK OF SUBJECT MATTER JURISDICTION

A. The Court Below Correctly Ruled that Petitioners Are Not Intended Third-Party Beneficiaries of the 1963 Contract[22]

The Ninth Circuit reached the correct result even as it ignored substantial surrounding history and circumstances that confirm that Petitioners are not intended beneficiaries with enforceable rights under the 1963 Contract. Accordingly, the decision below should be affirmed.

[22] Westlands is, of course, concerned about the rights and interests of its landowners, including those of Petitioners. In this context, it well understands the real injury that has been caused by enactment of the CVPIA and other similar actions by the United States. These actions have caused both the reduction in water supply made available to Westlands for allocation to its landowners, as well as the increase in per-acre-foot cost for the water that is ultimately provided by Westlands to its landowners. Nonetheless, the fact that injury has been caused does not, itself, create intended third-party beneficiary status in these Petitioners.

1. The Determination of Intended Third-Party Beneficiary Status Under a Government Contract Depends on a Finding, Based on the Contract and Its Surrounding Circumstances, of an Intent of the Parties to Directly Benefit and Thus Allow Direct Enforcement of the Contract by the Third Party

Federal common law governs the analysis of whether Petitioners are third-party beneficiaries under the 1963 Contract. *Boyle v. United Technologies Corporation*, 487 U.S. 500, 504 (1988) ("[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law."). While privity of contract is generally required to maintain a breach of contract action, there are exceptions.

This Court has long recognized that a beneficiary of a promise between two persons may have the right to file suit to enforce the promise. *National Bank v. Grand Lodge*, 98 U.S. 123, 124 (1878). The Court directly addressed the propriety of a third-party beneficiary action in *German Alliance Insurance Company v. Home Water Supply Company*, 226 U.S. 220 (1912) ("*German Alliance*"). In *German Alliance*, a municipality entered into a contract with a water company to provide, among other things, water to extinguish fires. *Id.* at 222. A property owner attempted to sue the water company for breach of contract when fire damaged his property and the water supply was inadequate to extinguish the fire. *Id.* at 222. While recognizing differing standards applied by state courts, this Court stated a fundamental requirement that "[b]efore a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which

he is not a party, he must, at least, show that it was intended for his direct benefit." *Id.* at 230. This Court ultimately rejected the propriety of the landowner's third-party action since potentially opening the door to a multitude of third-party actions, under the facts presented, "could not have been in contemplation of the parties." *Id.* at 231.

In subsequent years, the Court has addressed possible third-party actions infrequently. *See, e.g., Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (Scalia, J., concurring) ("[u]ntil relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it."); *Kansas v. Colorado*, 514 U.S. 673, 683 n.3 (1995) (Court declined to express an opinion as to whether Kansas was a third-party beneficiary under the subject agreement); *Wyoming v. Oklahoma*, 502 U.S. 437, 473 (1992) (Scalia, J., dissenting) (limits on contractual third-party beneficiary actions circumscribe the availability of damages in contract actions); *Schneider Moving & Storage Company v. Robbins*, 466 U.S. 364, 370 (1984) (no apparent dispute as to third-party beneficiary status); *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 29 (1977) (choice of law issue in determining whether individual third-party beneficiaries had standing to sue County); *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 18 n.15 (1977) (declining to address whether bondholders were third-party beneficiaries).

Lower federal courts, the Restatement of Contracts and commentators have had more occasions to address the ability of a third party to sue on a contract. Where contracts involving the United States Government have been involved, such cases have often arisen in the United States Court of Federal Claims and have been addressed by the

Court of Appeals for the Federal Circuit. Recently, the Federal Circuit articulated the proper standard as follows:

> In order to prove third party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.

Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001).

This standard is consistent with the approach of the Restatement of Contracts, which provides:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1981).

The Restatement further divides potential contractual beneficiaries into two classes: intended beneficiaries and incidental beneficiaries. "A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty" but "[a]n incidental beneficiary acquires

by virtue of the promise no right against the promisor or the promisee." *See* Restatement (Second) of Contracts §§ 304, 315. Under § 302(1), it is an essential prerequisite to intended beneficiary status that "recognition of [an enforceable] right to performance in the beneficiary" will "effectuate the intention of the parties." *Id.*, § 302(1).

In addition to examining the contract language for evidence of the parties' express or implied intent to directly benefit the third party, federal common law requires an evaluation of the circumstances surrounding the transaction. For example, in *Schneider Moving & Storage Company v. Robbins*, 466 U.S. at 370-71, in counseling against "mechanical application" of rules of construction in a case involving a third-party beneficiary, this Court sought to determine the parties' intent through the examination of contractual language and the circumstances under which it was executed.

Likewise, the Federal Circuit has observed:

> [w]hen the intent to benefit the third party is not expressly stated in the contract, evidence thereof may be adduced. For determination of contractual and beneficial intent when, as here, the contract implements a statutory enactment, it is appropriate to inquire into the governing statute and its purpose. *See, e.g., Rendleman v. Bowen*, 860 F.2d 1537, 1541-42 (9th Cir. 1988) (when the contract terms are mandated by Congress, statutory intent is highly relevant to contractual interpretation); *American Hosp. Ass'n v. Schweiker*, 721 F.2d 170, 183 (7th Cir. 1983) (legislative intent is relevant when the contract implements a statute); *Busby School of Northern Cheyenne Tribe v. United States*, 8 Cl.Ct. 596, 602 (1985) (the court considers statute, regulations, and

policy, in determining whether the plaintiffs are third party beneficiaries).

Roedler v. Department of Energy, 255 F.3d 1347, 1352 (Fed. Cir. 2001); *see also North Star Steel Co. v. United States*, 58 Fed. Cl. 720 (2003) (in finding third-party beneficiary status the court examined circumstances concerning contract formation, execution, contractual language and subsequent actions taken by the parties to implement its terms).

Contrary to these authorities, the Ninth Circuit has adopted a quite narrow view of what can properly be considered in assessing intended third-party beneficiary status. For example, in *Kremen v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003), that court stated that:

> A party can enforce a third-party contract only if it reflects "an express or implied intention of the parties to the contract to benefit the third party." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999). . . . When a contract is with a governmental entity, a more stringent test applies: "Parties that benefit . . . are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary." *Id.* The contract must establish not only an intent to confer a benefit, but also "an intention . . . to grant [the third party] enforceable rights." *Id.*

Kremen v. Cohen, 337 F.3d at 1029.

The court of appeals below relied upon *Klamath* and ultimately concluded the farmers were not intended third-party beneficiaries of the 1963 Contract because "the 1963 contract does not 'illustrate[] an intention of [Westlands] or the United States to grant [the farmers] enforceable

rights.'" Pet. App. 14a (bracketed phrases in original). The court of appeals explained that in determining third-party beneficiary status under governmental contracts, parties that benefit "are generally assumed to be incidental beneficiaries, and may not enforce the contract *absent a clear intent to the contrary*." Pet. App. 10a (citing *Klamath*, 204 F.3d 1206, italics in original). The court of appeals referred in several places to this standard, concluding that "the farmers in our case fail to satisfy the 'clear intent' standard" (Pet. App. 11a), and that the law in the Ninth Circuit "requires an examination of the precise language of the contract for a 'clear intent' to rebut the presumption that the farmers are merely incidental beneficiaries." Pet. App. 15a n.5.

The court of appeals also confined its inquiry narrowly to two express provisions of the 1963 Contract, article 15 and article 11. Pet. App. 11a-14a. Based upon these provisions, the court of appeals determined that Petitioners lacked intended third-party beneficiary status. Pet. App. 14a. The court concluded "Article 15 and Article 11(b) merely show that the 1963 contract operates to the farmers' benefit and was entered into with the farmer 'in mind.' That by itself is not enough under *Klamath* to confer intended third-party beneficiary status on farmers." Pet. App. 14a. This approach is consistent with the analysis in *Klamath* which noted: "[t]he plain language of the Contract is sufficient to rebut the contention that the Irrigators are intended third-party beneficiaries." *Klamath Water Users Protective Association v. Patterson*, 204 F.3d at 1211. Thus, in both cases, the Ninth Circuit simply relied upon the four corners of the contract in declining to find an intended third-party beneficiary.

The proper approach in such circumstances was addressed at some length by then Circuit Judge Kennedy in a concurring opinion in *Williams v. Fenix & Scisson, Inc.*, 608 F.2d 1205 (9th Cir. 1979), where the court found that plaintiff was not an intended beneficiary. He emphasized that:

> The majority fails to consider substantial extrinsic evidence, offered by plaintiff in the district court proceedings and discussed at great[] length below, which would aid in interpreting the intent of the parties. Its reason is that the words of the contract are unambiguous. This approach to contractual interpretation has been rejected by this circuit and it is out of line with better-reasoned contract law cases. It results in the exclusion of evidence clearly probative of the parties' understanding of their obligations. Examination of the circumstances which gave rise to the agreement, and of subsequent acts and communications which bear on the parties' intent at the time of contracting, are relevant to show the intended meaning of a provision in a contract.

Id. at 1210-11.

The Restatement similarly supports a broad review in order to determine the parties' intent. The Reporter's Note to § 302 expressly states: "[a] court in determining the parties' intention [concerning third-party beneficiary status] should consider the circumstances surrounding the transaction as well as the actual language of the contract." Restatement (Second) of Contracts § 302 cmt. a. An analysis of the underlying facts, circumstances and contractual background information may ultimately allow for third-party beneficiary status in situations where a limited review of the contractual text would not. Westlands thus

submits that the Ninth Circuit took an unduly narrow view of what it should consider in determining whether Petitioners are intended beneficiaries with rights to sue under the 1963 Contract. The court's task would have been a great deal easier and its conclusion more compelling if it had looked beyond the specific words of the 1963 Contract and especially of the two provisions on which it focused, and considered several highly relevant surrounding circumstances. These include (1) the history of Reclamation law and Congress' decision in 1926 to deal with local governmental entities; (2) the legal ownership rights to water delivered under the 1963 Contract; and (3) the governmental powers and purposes of Westlands.

2. Congress's Insistence in 1926 on Dealing Only with Local Governmental Districts and Westlands' Status as a Governmental Entity with Primary Responsibility for Management and Distribution of the Water Delivered Under the 1963 Contract, Together Strongly Support the Conclusion that Petitioners Have No Right to Sue Under the 1963 Contract

The evolution of reclamation law, and the critical legislative decision in 1926 to require that all contracts for use of reclamation water be through districts, is recounted at some length above. *See supra* 14-19. That legislative decision evidenced a concern for the financial integrity of the reclamation projects, to be advanced by the identification of a local governmental entity – the water district, with powers to secure funding from its members – from whom the United States could expect to receive satisfaction on the terms of the contract, and to

whom the United States would owe its contractual obligations.

It is within this statutory framework that the 1963 Contract was executed. While it rested with the parties to that Contract to prescribe the precise rights those receiving water under the Contract would have, it would be surprising and somewhat incongruous with the underlying legislative scheme if individual farmers (or *an* individual farmer) within Westlands were, in fact, accorded the contractual right to second-guess litigation and other decisions of Westlands, and pursue their distinct and individual interests by separate litigation against the United States. Such a right would undermine the policy objectives behind the 1926 legislation by severely impairing the ability of Westlands to speak and be accountable for the contractual interests of the District as a whole. Apart from this legislative scheme and the words of the 1963 Contract that were examined by the court below, other critical facts make clear that the parties to the 1963 Contract intended no such result.

Westlands was formed and exists pursuant to the general California Water District Law (Cal. Water Code § 34000 *et seq.*) and special legislation enacted as the Westlands Water District Merger Law (Cal. Water Code § 37800 *et seq.*). Specific provisions of this statutory scheme establish and govern Westlands' interest in and control over the water that is acquired and delivered by Westlands. In this regard, Cal. Water Code § 35602 provides as follows: "There is given, dedicated and set apart for the uses and purposes of each district all water and

water rights belonging to the State *within the district.*" (Emphasis added.)[23]

Once CVP water is delivered to Westlands under the 1963 Contract, such water is clearly "within the district," and is therefore "dedicated . . . for the uses and purposes of the district." In addition, once a water supply is secured by Westlands (*e.g.*, water served under the 1963 Contract), the Water Code specifically directs how such water is to be apportioned and allocated to landowners affording Westlands a great deal of discretion regarding which landowners will receive what amount of water. *See* Cal. Water Code §§ 35420-35429. Cal. Water Code § 35423 empowers Westlands to withhold water deliveries to landowners that fail to abide by Westlands' rules and regulations governing the sale, distribution and use of water within the district. Cal. Water Code § 35408 also grants to Westlands the right, among others, to "compromise" rights related to the ownership or use of waters or water rights within Westlands used or useful for any purpose of the district or a benefit to any land. Intended third-party beneficiary status for landowners to themselves claim and assert an ownership interest in district water would be in conflict with this district power. Finally, in this regard, Cal. Water Code § 35428 also provides that "[*n*]*o right in any water* or water right owned by the

[23] *See also Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 740 (1973) ("*Salyer*") (Douglas, J., dissenting) (noting that "[t]he Water Code of California states that 'all waters and water rights' of the State 'within the district are given, dedicated, and set apart for the uses and purposes of the district.' ").

District shall be acquired by use permitted under this article." (Emphasis added.)[24]

Petitioners assert that they own the right to water secured by contract and, in that context, can enforce the right as an intended third-party beneficiary to the 1963 Contract even if they choose to do so in a manner different than Westlands. As noted, Petitioners are precluded from asserting this right through relevant provisions of the California Water Code which provides that, as between Westlands and its landowners, it is Westlands that "owns" the relevant water rights. Cal. Water Code § 35428. Only in this way can Westlands preserve and protect the collective rights of *all* district landowners in the water secured in the 1963 Contract, not just from the actions of the United States, but also from the individual actions of potentially dissenting landowners within Westlands including, for example, the Petitioners. To proceed in any other way would be to reduce Westlands' collective right to mere individual rights, thereby making the role of the district irrelevant, negating the ability of the district to administer its affairs and carry out its purposes. While Petitioners are correct that in the context of Reclamation law the United States does not "own" the water rights in question, they are incorrect in not recognizing that those rights are for Westlands, not Petitioners, to enforce.

Perhaps to circumvent these obvious state law limitations on their asserted ownership of water rights within California water districts, Petitioners assert that irrigation districts hold water in "trust" for landowners within

[24] Importantly, Petitioners wholly ignore and fail to even cite to this provision in their brief on the merits. *See* Pet. Br. xiii.

districts, and that the beneficial ownership of water is with the landowner. Pet. Br. 45 n.53. Westlands, however, is not an irrigation district, but rather is a "California Water District" and thus governed by the above-referenced provisions. But even if it were an irrigation district, while water rights acquired by irrigation districts for use in the district are held in trust for the district's purposes and uses, this does not mean that a private ownership in water rests with landowners within an irrigation district. Cal. Water Code §§ 22437, 20529 ("'[p]roperty' . . . embraces all real and personal property, including water, water rights. . . . "). Indeed, just as with a California Water District, the Irrigation District Law provides that "[n]o right to any water or water right owned by the district shall be acquired by use permitted under this article." Cal. Water Code § 22262.[25]

Further, the decision of the court below is strongly supported by the fact that Westlands is a fully-functioning governmental entity. Westlands was formed and exists pursuant to the general California Water District Law, as codified in Division 13 of the Cal. Water Code § 34000 *et seq.*, and special legislation enacted as the Westlands

[25] The purpose of an irrigation district is to obtain and distribute water for improvement, by irrigation, of lands within the district. *Jenison v. Redfield*, 149 Cal. 500, 503 (1906); *Hall v. Superior Court of Imperial County*, 198 Cal. 373 (1926). The water user "is entitled to have distributed to him for that purpose such proportion as his assessment [by the irrigation district] entitled him to." *Jenison v. Redfield*, 149 Cal. at 504. The irrigation district, as trustee, "must administer [the trust] consistently with and not in violation of the rights of their beneficiaries." *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal.2d 597, 624 (1957), *reversed on other grounds sub nom. Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958). Thus, the water users hold only an equitable interest, subject to the trust, in the water rights of the irrigation district. *Jenison v. Redfield*, 149 Cal. at 503-504; *Hall v. Superior Court of Imperial County*, 198 Cal. 373.

Water District Merger Law. Cal. Water Code § 37800 *et seq*. This special legislation accomplished, among other things, the merger of the West Plains Water Storage District into Westlands, and designated Westlands as the surviving district. Cal. Water Code §§ 37820-37822. The statutes also expressly state that Westlands, as the surviving district, is a public agency of the state. Cal. Water Code § 37823. These provisions, moreover, confirm that Westlands "succeeds to all properties, rights, and contracts of the two districts . . ." and that, except as expressly provided therein, Westlands shall in all respects be operated, managed, and governed in accordance with the law for California water districts generally. Cal. Water Code § 37826.

As a California water district, Westlands maintains numerous broad powers and authorities that are traditionally governmental, including the power of eminent domain (Cal. Water Code § 35600), the power to enter into contracts for water (Cal. Water Code § 35403), the power to enter upon any land for the purposes of the district (Cal. Water Code § 35404), the power to buy, hold and sell property (Cal. Water Code §§ 35405, 35604), and the power to issue general obligation bonds (Cal. Water Code §§ 35950, 36150). Westlands also carries the traditional limitations on claims for money or damages against governmental agencies. Cal. Water Code § 35752. Finally, Westlands' powers include the authority to undertake all acts necessary or proper to effectuate its purposes and to carry out fully the provisions of the California Water District Act. Cal. Water Code § 35400.

Westlands also has the specific power to contract with other entities or public agencies, including with the United States for water under the Reclamation Act of 1902 and all

acts amendatory thereof or supplementary thereto. *See* Cal. Water Code §§ 35850-35855 and 35875-35886. Cal. Water Code § 35876(b) specifically empowers California water districts to contract with the United States for a water supply. Any such contracts with other parties, including the Bureau, are subject to a challenge by a legal action to determine their validity. Cal. Water Code § 35855. In addition, proposed contracts between water districts and the United States, for any purpose other than obtaining a water supply, may be challenged through a vote of all landowners in an election within the district. Cal. Water Code §§ 35881-35886.

Petitioners assert that Westlands is not really a government, but rather a "surrogate" or "middleman" with no right to own water itself. Pet. Br. 44-46. Petitioners apparently advance this theory in order to avoid application of the general rule that members of the public are not the intended beneficiaries of a contract with a governmental entity. *See* Restatement (Second) of Contracts § 313. In seeking to avoid the operation of this general rule, Petitioners rely upon inapposite authority or selectively quote from this Court's precedents to allege that Westlands is not a "real" government.[26] *See* Pet. Br. 44, *citing Salyer*

[26] Petitioners also lean heavily on language in *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed. Cir. 1984), for the proposition that a water district is the landowners' surrogate and that landowners may, therefore, sue directly for the enforcement of contracts related to their water supplies. In that case, the court found that the farmers had a direct property interest in the water rights at issue and, in fact, the farmers in that case had originally contracted directly with the United States prior to the formation of their district. *Id*. at 1576. The *H.F. Allen Orchards* court, however, made no categorical holding that all irrigators using water from a Reclamation project are intended beneficiaries of water service contracts. In fact, that case did not involve a Reclamation

(Continued on following page)

Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719; *Ball v. James*, 451 U.S. 355 (1981) ("*Ball*").

Salyer and *Ball*, however, involved challenges to the apportionment of voting rights, where such apportionment was based upon the value of individual land holdings (*Salyer*, 410 U.S. at 720) or upon the number of acres owned (*Ball*, 451 U.S. at 357). Both cases involved landowners' assertions that the voting rights apportionment violated the "one person, one vote" rule, and effectuated a denial of equal protection under the law for certain landowners and residents. This Court, in both cases, held in favor of the districts. *Salyer*, 410 U.S. at 733-34; *Ball*, 451 U.S. at 371. In each case, this Court expressed an institutional respect for the purpose and mission of the districts being challenged. *Salyer*, 410 U.S. at 721-23; *Ball*, 451 U.S. at 357-58. These cases, therefore, actually undercut Petitioners' claim that Westlands is not a true government.

Moreover, in the *Salyer* case, Justice Douglas, joined by Justices Brennan and Marshall, recognized that various types of water districts in California are essentially governmental in nature:

> Such state agencies are considered exclusively governmental, and their property is held only for governmental purpose, not in the proprietary sense. They are a public entity, just as any other political subdivision. That is made explicit in various ways. The Water Code of California states that all waters and water rights of the State within the district are given, dedicated, and set apart for the uses and purposes of the district. Directors of the district are public officers of the state. The district possesses the power of eminent domain. Its works may not be taxed. It carries a governmental immunity against suit. A district has powers that relate to irrigation, storage of water, drainage, flood control, and generation of hydroelectric energy.

Salyer, 410 U.S. at 740 (Douglas, J., dissenting) (internal quotations and citations omitted). Nothing within the majority opinion was inconsistent with this statement. Accordingly, it is quite clear that water districts, such as Westlands, are real governmental bodies and not mere pass-through entities that are formed exclusively to contract in landowners' names.

A further demonstration of this is the fact that landowners within Westlands are afforded specific rights and remedies under state law to contest the governmental decisions that are made by Westlands. In this regard, landowners may avail themselves of the validation proceedings pursuant to Cal. Code Civ. Proc. § 860 *et seq*. Under these provisions, any interested person may bring an action to determine the validity of any matter, which under state law is authorized to be determined pursuant to those provisions. *Id*. at §§ 860, 863. As noted above, the water service contracts between Westlands and Reclamation, including the 1963 Contract, are subject to validation proceedings. Cal. Water Code § 35855. In fact, the 1963 Contract itself contains a provision that required a confirming validation proceeding. *See* Pet. App. 56-57.

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contract at all. *Id*. Rather, it involved a consent decree and subsequent alleged implied contracts, and the court made no general pronouncements about the relationship between irrigators and the federal government.

Landowners within Westlands may also avail themselves of the special writ proceedings allowed under California law to challenge certain decisions or actions by Westlands with regard to its performance of its governmental functions. *See* Cal. Code Civ. Proc. § 1063 *et seq.* For example, Cal. Code Civ. Proc. § 1085(a) provides that a "writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station. . . ."

The foregoing procedures and proceedings would be meaningless and, in effect, would be nullified if Petitioners or other landowners had a general right to collaterally attack Westlands' contracting decisions through the assertion of intended beneficiary status. Under those circumstances, a small group of dissenting landowners, or even a single dissenter, might otherwise completely obstruct Westlands' ability to make and administer contracts in accordance with the law. This would also conflict with Westlands' general duty and obligation to implement decisions that take into account the best interests of the District as a whole.

In the instant case, Westlands chose to dismiss its lawsuit in the underlying litigation for substantial reasons that relate to multiple actions regarding Westlands' water supplies in other arenas. If a dissenting minority of its landowners could, through the assertion of intended third-party beneficiary status, assert a legal position different from Westlands with respect to rights under the 1963 Contract, Westlands' authority to secure and provide water supplies for its constituents as a whole would be seriously undermined. Accordingly, the surrounding circumstances of Westlands' governmental powers and

purposes weigh heavily against any finding of intended beneficiary status.

B. Even Assuming *Arguendo* That Petitioners Were Intended Third-Party Beneficiaries Under the 1963 Contract, the Waiver of Sovereign Immunity Under 43 U.S.C. § 390uu does Not Extend to Petitioners' Claims Because They Are Not the "Contracting Entity"

In the proceedings below, the entire discussion of third-party beneficiary status was in the context of whether the trial court had jurisdiction over the Petitioners' claims against the United States. Pet. App. 5a-17a. The Petitioners claimed that the court had jurisdiction as a result of the waiver of sovereign immunity found in 43 U.S.C. § 390uu.[27] The Petitioners and even the Ninth Circuit assumed that if the landowners were intended third-party beneficiaries of the 1963 Contract, then the waiver of sovereign immunity in § 390uu extended to them. This assumption, however, ignores the plain language of § 390uu and legislative authority that waivers of sovereign immunity by the United States must be strictly and narrowly construed. *E.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992).

Generally, the United States, as a sovereign, is immune from suit except where it has consented to being sued. *United States v. Sherwood,* 312 U.S. 584, 586 (1941). Within the context of federal Reclamation law, however,

[27] Notably, in the operative complaint below, the Petitioners pled jurisdiction and waiver of sovereign immunity only under § 390uu. Pet. App. 8a.

the Reclamation Reform Act, 43 U.S.C. § 390uu, offers a limited express waiver of sovereign immunity for suits regarding contracts executed pursuant to Reclamation law:

> Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of *a contracting entity* and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in the United States district court in the State in which the land involved is situated.

43 U.S.C. § 390uu; Pet. App. 47a (emphasis added). The plain and unambiguous language of this statute, therefore, relates to a waiver of sovereign immunity in suits involving the rights of an entity which contracts with the United States. Conversely, it does not waive the United States' sovereign immunity for suits involving contractual rights asserted by a third party, even if the third party is an intended contract beneficiary.

Where statutory language is unambiguous, that language must ordinarily be regarded as conclusive. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988). The only published federal court decision that has reviewed the scope of the waiver in § 390uu found that

§ 390uu is clear and unambiguous, and that, by contrast, the relevant legislative history is unclear and ambiguous.[28] *See Wyoming v. United States*, 933 F.Supp. at 1034-40 (third party district is not a "contracting entity" within the meaning of 43 U.S.C. § 390uu, and not entitled to sue as beneficiary of a contract between another district and the United States).[29] Moreover, this Court has said that "[w]aivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed" and "the Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarged . . . beyond what the language requires. . . . " *United States v. Nordic Village*, 503 U.S. at 33 (internal quotes and citations omitted).

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[28] Westlands is mindful of the aspects of the legislative history cited by Petitioners. *See* Pet. Br. 12 n.24. This history is not sufficient, however, to override the clear and unambiguous language of the statute. *See Wyoming v. United States*, 933 F.Supp. 1030, 1039 (D.Wyo. 1996).

[29] In its June 5, 1998 Memorandum Opinion and Order (subsequently superseded), the district court below initially found that the waiver of § 390uu extended to petitioners. Pet. App. 26a; 1 E.R. 199-205. Citing *Indian Towing v. United States*, 350 U.S. 61, 69 (1955), the district court relied on the principle that a court should not interpret a waiver so narrowly as to "import" total immunity into a waiver. 1 E.R. 201. Limiting the waiver of § 390uu to "contracting entities," however, does not "totally" gut the waiver. Westlands and other districts with contracts with the United States are clearly "contracting entities" and within the scope of the waiver. Moreover, the broad interpretation of § 390uu urged by the Petitioners might lead to the explosion of litigation envisioned in the *Wyoming* case. *Wyoming v. United States*, 933 F.Supp. at 1039-40. Finally, the cases relied on by the district court were Court of Claims cases interpreting generally the Tucker Act, 28 U.S.C. § 1491, or other jurisdictional act and not § 390uu. In each of these cases, except *Hebah v. United States*, 428 F.2d 1334 (Ct. Cl. 1970), the third party to the contract was found not to have a claim. In *Hebah*, the Indian treaty in question was found to have conferred individual rights and the Court allowed the claim to proceed. *Id.* at 1340.

Accordingly, the express language of the waiver of sovereign immunity at issue here must be read to preclude suit against the United States by third parties, even if they are intended third-party beneficiaries as alleged by the Petitioners herein.

In this regard, it is again worth noting that the 1926 Omnibus Adjustment Act limited Reclamation contracting to only the United States and districts or water user associations. Congress was, of course, aware of this provision when it enacted the Reclamation Reform Act and provided for the waiver of sovereign immunity under § 390uu. That waiver tracks the contracting process provided for in the 1926 Act.

A lack of intended third-party beneficiary status and a strict construction of § 390uu does not necessarily leave district landowners, such as Petitioners, without a possible forum to resolve claims for monetary damages against the United States related to the Bureau's reduced deliveries. As emphasized by both the court of appeals and district court below, it is possible that such claims are maintainable in the Court of Federal Claims. Pet. App. 17a, 38a-45a. Water users such as Petitioners have been held to have a Fifth Amendment takings claim cognizable in the Court of Federal Claims for the same types of government activities challenged by Petitioners herein. *Tulare Lake Basin Water Storage District v. United States,* 49 Fed. Cl. 313. In *Tulare,* the court based its grant of summary judgment on the finding that the water users owned a usufructuary right to the water they were receiving from the state, but which had been taken when the United States restricted the times and amounts of diversions in favor of the winter-run chinook salmon and delta smelt. The court's decision did not depend on or even discuss

whether the water users were third-party beneficiaries of the contracts involved.[30]

CONCLUSION

For these reasons, Respondent Westlands respectfully requests that, based upon the foregoing, the decision of the court below be affirmed.

Respectfully submitted,

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DATED: January 7, 2005

[30] In addition, it was recently reported that the United States declined to appeal the Court of Federal Claims' *Tulare Lake* decision, and instead, announced that the United States has agreed to a settlement wherein it will pay $16.7 million to the water user plaintiffs. Bettina Boxall, L.A. Times, *U.S. to Pay $16 Million in Water Rights Case*, Dec. 22, 2004, at Part B, Page 1.

(12)

No. 03-1566

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IN THE

Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

The opinion below stands largely undefended. The contracting parties abandon the court's interpretations of the 1963 contract language, and its reason for ignoring the 1986 stipulated judgment. They do not strenuously contest that intended beneficiary status may be implied from circumstances, as well as language. They generally do not deny they intended to benefit the farmers nor that farmers bear the burdens of performance and possess rights to use water at law.

Respondents rest, instead, on four principal grounds, none of which is meritorious. First, the proper test is intent to benefit. There is no second element; any such element would not be applicable; if so, it would be satisfied. Second, 1926 Congressional legislation requiring the Bureau of Reclamation to make contracts with districts does not forbid intended beneficiary status. Third, the operative sovereign immunity waiver statutes do not bar such claims. Fourth, the Bureau is precluded from raising its defenses by prior judgments.

I. THE FARMERS ARE INTENDED BENEFICIARIES OF THE 1963 CONTRACT, AS ENFORCED BY THE 1986 STIPULATED JUDGMENT

A. *The Contract and the Judgment Establish Direct Benefits Sufficient to Confer Intended Beneficiary Status*

Petitioners must show the 1963 contract was intended for their direct benefit. *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912). The Ninth Circuit acknowledges such "benefit." Pet. App. A at 14a, 14a-15a n.5. Westlands Water District and its *amici* Idaho and Washington farm bureaus do too. WWD Br. 22 n.21, 28-30; Farm Br. 14, 15, 16-18. Benefit is explicit in the language of the 1963 service contract, the 1965 repayment

contract, and each recordable contract. JA 45, 55, 79, 93. These expressions of intent establish intended beneficiary status.

However, the Bureau contends the benefit is not "direct." Bur. Br. 27-28, 29-30 n.13. This contention impermissibly contradicts the Bureau's agreement in each recordable contract that it was made "in consideration of the *direct* and indirect *benefits*" to the landowner under the 1963 contract. JA 93 (emphasis added). U.C.C. § 2-202; *O'Neill v. United States,* 50 F.3d 677, 685 (9th Cir. 1995), *cert. denied,* 516 U.S 1028 (1995).[1]

The requisite intent to benefit is explicitly confirmed in Paragraph 4.2 of the 1986 stipulated judgment, in which the District acknowledges it entered into the 1963 contract for the "benefit" of the pre-merger area lands. JA 111.[2] Respondents make two defective arguments to escape Paragraph 4.2.

First, the Bureau cites two cases for the proposition intent is ascertained when the contract is formed. Bur. Br. 44. Neither involved a second contract in which the parties unambiguously confirmed their intent, manifested in the first, to benefit a third party. A court will look to a second contract to determine the effect the parties gave to the first. *E.g., Trans Ocean Van Service v. United States,* 426 F.2d 329, 336 (Ct.Cl. 1970); *Olson Construction Co. v. United States,* 75 F.Supp. 1014, 1017 (Ct.Cl. 1948). Indeed, a party waives its right to litigate an issue where an agreement resolving it is

[1] The Bureau claims support of an example in a treatise. Bur. Br. 28, 30 n.13. The cases go the other way where the original seller is aware of the ultimate buyer. *E.g., Airplane Sales International Corp. v. United States,* 54 Fed.Cl. 418, 421 (2002); *Riegel Fiber Corp. v. Anderson Gin Co.,* 512 F.2d 784, 787-88 (5th Cir. 1975).

[2] Paragraph 4.3 of the judgment directs the District shall not "modify" the 1963 contract except with the "concurrence" of pre-merger area representatives. JA 112.

incorporated in a judgment. *United States v. Armour & Co.,* 402 U.S. 673, 681-82 (1971).

Second, the Bureau attempts to negate the first sentence of Paragraph 4.2 by means of the second. Bur. Br. 45. The two sentences serve different purposes. The first acknowledges the District entered the contract for the benefit of pre-merger area lands.[3] The second directs the District to enforce the prior rights of lands in that area over those in the merged area.[4]

B. *The Farmers' Direct Benefits Are Coupled With the Burdens of Performance*

Where third persons bear consideration given in exchange for benefits of performance, intended beneficiary status is implied. *E.g., H.F. Allen Orchards v. United States,* 749 F.2d 1571, 1576 (Fed. Cir. 1984), *cert. denied,* 474 U.S. 818 (1985); *Henderson County Drainage District No. 3 v. United States,* 53 Fed.Cl. 48, 52 (2002), *reconsideration denied,* 55 Fed.Cl. 334 (2003). Here, settlers joined the project, as a result of which farmers bear water charges under the 1963 contract, landowners pay land assessments under the 1965 contract, and landowners sell excess lands at without-water prices under recordable contracts. The circumstance of burden buttresses the language of benefit.

The Bureau unsuccessfully distinguishes these cases. Bur. Br. 34, 35 n.15, 40, 43 n.19. The districts in *Allen Orchards*

[3] The first major benefit to such lands was this: "The water service terms of the 1963 Contract will finally be performed by the District and the federal defendants, and the landowners and water users in [the pre-merger area] will now be able to enjoy the benefits to which they are entitled thereunder." AER 27/525.

[4] The second major benefit was this: "Section 37856 of the [Water Code] . . . will finally be honored by the District, and the landowners and water users in [the pre-merger area] will now be able to enjoy the 'prior right with respect to water' to which they are entitled thereunder." *Id.*

signed repayment contracts, before and after a consent decree, and the later contracts incorporated the decree and implied a promise. *H.F. Allen Orchards v. United States*, 4 Cl.Ct. 601, 603, 604, 607, 608, 612 (1984). *Henderson* involved the Corps, rather than the Bureau, and drainage, rather than water, service. But these distinctions make no difference.

C. *The Farmers' Direct Benefits Are Coupled With Property Rights in the Water*

(1) Petitioners argued that, where the third person owns a property interest in the subject of the contract, intended beneficiary status is enhanced, citing *Downey v. Federal Express Corp.*, C-92-4956, 1993 WL 463283 (N.D.Cal. Oct. 29, 1993) and *Allred v. Bekins Wide World Van Services,* 45 Cal.App.3d 984, 989, 120 Cal.Rptr. 312, 314-315 (1975). Pet. Br. 40 n.47. As stated in *Downey,* 1993 WL 463283 at *2, the "purpose" of the contract was to benefit the owner by delivering to him his own property. As observed in *Allred,* 45 Cal.App.3d at 989, such a contract is "obviously" made for the express benefit of the property owner.

Three articles of the 1963 contract refer to farmers' "right" to the "use" of water. JA 36, 43, 45-46. The Ninth Circuit construed these articles as referring to rights against the District, not the Bureau. Pet. Br. 28-29. None of the respondents defends this cramped interpretation.

The Bureau and intervenors Natural Resource Defense Council, *et al.*, note these articles do not "establish" their right to use the water. Bur. Br. 36-39; NRDC Br. 40, 45. But they do recognize that, at law, farmers will acquire that right, once water is applied to their lands. Furthermore, the contract establishes the use right "shall not be disturbed." JA 36.

(2) The 1963, 1965, and recordable contracts incorporate federal reclamation law. JA 30, 31, 64, 82, 92. The proviso of Section 8 of the 1902 act provides that the "right to the use of water" acquired thereunder shall be "appurtenant" to the land irrigated. 43 U.S.C. §§ 372, 485h-4.[5]

This Court holds the "right to the use of water" is a "property right" which becomes "part and parcel of the land" irrigated. *Ickes v. Fox*, 300 U.S. 82, 95-97 (1937); *Nevada v. United States,* 463 U.S. 110, 126 (1983), *reh'g denied*, 464 U.S. 875 (1983).[6] Respondents argue these cases did not involve a California district. Bur. Br. 43; Cal. Br. 4-5, 11-13; NRDC Br. 46. However, federal reclamation law operates uniformly throughout the west. *California v. United States,* 438 U.S. 645, 668 n.21, 672 n.25 (1978).[7]

(3) The 1963 and 1965 contracts also incorporate California law. JA 31, 82. Section 8 provides the act shall not be construed to "interfere" with state law and the Bureau shall "proceed in conformity" therewith, and it contemplates farmers will possess a state water "right" thereunder. 43 U.S.C. §§ 383, 485h-4. Under California law, an appropriative right is usufructuary. *California v. Superior Court,* 78 Cal.App.4th 1019, 1025, 93 Cal.Rptr.2d 276, 281-82 (2000). It is also appurtenant to the land watered. *Fullerton v. State Water Resources Control Board,* 90 Cal.App.3d 590, 598, 153 Cal.Rptr. 518, 523 (1979).

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[5] Under CVPIA Section 3405(a), Pub. L. No. 102-575, 106 Stat. 4706, 4709-12 (Oct. 30, 1992), Congress recognized individual farmers' rights to transfer project water, as NRDC acknowledges. NRDC Br. 35 n.17, 48 n.27. A right to dispose of one's own property is a fundamental aspect thereof. *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 167-68, 170 (1998).

[6] The Bureau's ownership of the water rights is "at most nominal," consisting of "mere title." *Nevada*, 463 U.S. at 126, 127.

[7] NRDC argues these cases are "factually distinguishable," because farmers acquired water rights before the project was built. NRDC Br. 46-47 n.25. As here, each project necessarily involved acquiring and perfecting water rights and making contracts to furnish irrigation water.

In the decisions governing permits issued to the Bureau for the Unit, *amicus* State Water Resources Control Board ruled farmers are the true owners of the usufructuary and appurtenant water right. Pet. Br. 6. Those permits were modified by the State Board in 1978. Decision D-1485, 1978 WL 41190 at 2, 9; *Tulare Lake Basin Water Storage District v. United States*, 49 Fed.Cl. 313, 316 n.3 (2001). When the 1993 and 1994 underdeliveries occurred, the permits, as modified, defined the scope of the state rights and allowed full deliveries. *Tulare*, 49 Fed.Cl. at 321, 322.[8]

The District concludes that all state laws are "not necessarily uniform," and the rule should not be "one-size-fits-all." WWD Br. 15-16 n.15, 23, 37 n.25, 39 n.26, 46. However, water rights in California, as other western states, are founded on the usufructuary and appurtenancy principles.[9]

A district's interest in federal project water is limited or nonexistent. In *Bryant v. Yellen*, 447 U.S. 352, 371 (1980), *reh'g denied*, 448 U.S. 911 (1980), this Court held the water

[8] Respondents state the Bureau "holds" the state water rights. Bur. Br. 41-42; NRDC Br. 41-42; Cal. Br. 4, 9. The interest it holds is "title" to the water right. *Ivanhoe Irrigation District v. All Parties and Persons*, 53 Cal.2d 692, 703-04, 715-16, 3 Cal.Rptr. 317, 323, 330-31 (1960).

[9] The Bureau argues irrigators hold no property right to water under Washington law after *Department of Ecology v. Bureau of Reclamation*, 118 Wash.2d 761, 771, 827 P.2d 275, 281 (1992). Bur. Br. 34-35 n.15. The claimant there had improperly attempted to appropriate, without having any contract, previously appropriated project water. The court said nothing about the property rights of farmers benefitted by contracts with the Bureau. The year before it had held such farmers owned usufructuary and appurtenant water rights. *Neubert v. Yakima-Tieton Irrigation District*, 117 Wash.2d 232, 237, 814 P.2d 199, 201-02 (1991) (en banc). The Bureau also cites *Israel v. Morton*, 549 F.2d 128, 132 (9th Cir. 1977), for the proposition end users in a federal project do not acquire appropriative rights which transcend contractual terms. Bur. Br. 42. There, the landowner's excess land was "not . . . entitled to project water and has never received any." *Israel*, 549 F.2d at 132.

right was "equitably owned by the beneficiaries" to whom the district was obligated to deliver water. The question of what interest the district in the *Nevada* case owned was resolved in *Truckee-Carson Irrigation District v. Secretary of Department of Interior*, 742 F.2d 527, 530-31 (9th Cir. 1984), *cert. denied*, 472 U.S. 1007 (1985). The court ruled it held "no right to the water itself." *Id.* Its purely contractual right was to manage facilities.

The District nevertheless insists it "owns" water rights under two California statutes,[10] citing first Water Code Section 35428 (no water or right owned by district shall be acquired by permitted use). WWD Br. 36. This statute has been applied to bar a claim by a temporary user of water outside a district. *Ivanhoe Irrigation District v. All Parties and Persons*, 47 Cal.2d 597, 645-46, 306 P.2d 824, 853-54 (1957), *rev'd on other grounds, Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958).

The District also cites Water Code Section 35602 (dedicates for district purposes the water and water rights within it). WWD Br. 34-35. This cryptic statute has not been judicially construed, and says nothing about the respective property interests among the Bureau, a district, and its farmers.

The State Board argues, for the first time, farmers have "no property interest" in the water. Cal. Br. 3, 4, 5, 10, 11, 13. Its arguments differ from the District's, but are also unconvincing.

First, the State Board claims *Ivanhoe*, 53 Cal.2d at 715-16, held farmers had no property right. Cal. Br. 3, 13. Instead, the court confirmed the validity of reclamation contracts. *Ivanhoe*, 53 Cal.2d 715-16. It did not explicate farmers' water rights.

[10] The District's arguments were not raised below and, therefore, should not be considered here. *Ryder v. United States*, 515 U.S. 177, 184 n.4 (1995); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989).

The State Board next cites *Erwin v. Gage Canal Co.*, 226 Cal.App.2d 189, 194, 37 Cal.Rptr. 901, 903 (1964), for the proposition that farmers' interests are not property. Cal. Br. 10-11. But, as this Court noted in *Bryant*, *Erwin* established that landowners have a legally enforceable right, appurtenant to their lands, for continued service. 447 U.S. at 371 n.23.

The State Board notes a water right is subject to change of place of use under Water Code Sections 1701 and 1702, arguing this procedure is "inconsistent" with recognition of farmers' water rights. Cal. Br. 9-10 n.5, 13. This is incorrect where the owner, rather than a government agency, has the right to effect the change of place of use. In any event, during the years in question here, no such change had occurred.

The State Board argues the state appurtenancy principle establishes only a "restraint on out-of-project transfers." Cal. Br. 3-4, 7. Sections 1701 and 1702 do not address the respective property interests among the participants in a federal reclamation project, nor do they abrogate the usufructuary or appurtenancy principles.

Finally, the State Board contends the District was not a "legal user" of water and, thus, could not claim "injury" barring a change of place of use under Section 1702. Cal. Br. 7-8. But a farmer is a user of water, and reallocating half of the supply to the Pacific Ocean causes him or her injury.[11]

The divergent arguments of the District and State Board fail to account for other rules governing farmers' rights.

[11] Respondents rely heavily on D-1641. Bur Br. 42; Cal. Br. 6 n.3, 7-9, 8 n.4, 9-10 n.5; NRDC Br. 41 n.20, 42 n.21, 45 n.24. This reliance is misplaced. The State Board explicitly declined to address any federal contract claims against the Bureau. Revised Decision D-1641, 1999 WL 1678482 at 81, 85. Furthermore, D-1641 was not in effect when the underdeliveries occurred, farmers were not parties to the State Board's proceedings, and the trial court decision upholding D-1641 is still on appeal.

Respondents disregard Water Code Section 37856 (lands in pre-merger area shall have a right with respect to water to which the District is entitled under the 1963 contract), Water Code Section 23200 (water shall be distributed and apportioned by a district in a federal project in accordance with acts of Congress and provisions of the federal contract), and *California,* 438 U.S. at 668 n.21, 670, 672, 674-79 (state law which is inconsistent with a Congressional directive is preempted).

D. *No Second Prong to the Intended Beneficiary Test Bars the Farmers' Claims*

(1) The Bureau cites *Restatement (Second) of Contracts* Section 313(2)(a) (where promisor contracts with a "government," it is not liable to a "member of the public," unless the terms of the promise "provide for such liability"), arguing the 1963 contract must have explicitly granted petitioners "the right to enforce" it. Bur. Br. 25, 26, 28, 29, 32, 35, 36, 39, 40, 41, 43, 45.

In *German Alliance* this Court announced the intent to benefit test, and applied it to the facts. The contract did not express the parties made it for the building owners' benefit. They had no contract right against the city for water service. And they had no property interest in the water purchased by the city. Instead, their benefit was incidental, like that enjoyed by all city residents to all city services. The Court did not formulate a second prong requiring enforcement rights. To the same effect is *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 164-66, 159 N.E. 896, 897-98 (1928).

The notion of a second prong arose in the claims court decision in *Allen Orchards*, 4 Cl.Ct. at 609, 610 (parties had to manifest "the specific intent to give the individual an enforceable right"). This conclusion was rejected by the Federal Circuit, *Allen Orchards,* 749 F.2d at 1576, which ruled farmers were intended beneficiaries based on circumstances satisfying the intent to benefit test.

In *Schuerman v. United States,* 30 Fed.Cl. 420, 428 (1994), the claims court held the second prong "consistently has been misapplied and without analysis has been accepted" in the Federal Circuit. Jurisdiction has been constricted "without a reason in law or binding precedent to justify it." *Id.* The court held the proper test is the intent to benefit test, citing *German Alliance. Id.* at 433. The Federal Circuit now holds that the appropriate test includes "only the first prong." *Montana v. United States,* 124 F.3d 1269, 1273-74 (Fed. Cir. 1997).

The supposed second element is effectively subsumed under the intent to benefit test and, therefore, unnecessary. Promises intended to benefit third persons create a "duty" in the promisor to the intended beneficiary, and he or she may "enforce" that duty. *Restatement (Second) of Contracts* § 304.[12]

Furthermore, the intended beneficiary rule is an "exception" to the traditional rule that only a signatory may sue. *German Alliance,* 226 U.S. at 230. Rarely, if ever, do contracting parties manifest intent to confer on intended beneficiaries specific remedies for enforcing the rights.[13] A second enforcement prong would effectively reinstate the outmoded citadel of privity and nullify the *German Alliance* test.

(2) Were there a second enforcement prong, it would not be applicable here. Farmers are not members of the public, as respondents contend. Bur. Br. 26, 32; WWD Br. 45-46; NRDC Br. 26, 27.

The farmers were a defined class of persons intended to benefit from the Bureau's performance. Where any government is given a promise which specially benefits a defined class,

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[12] The Bureau acknowledges the obligation, and must not be allowed to deny its enforceability. *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953) ("Legal obligations that exist but cannot be enforced are ghosts . . . that are elusive to the grasp"(citation omitted)).

[13] The state farm bureaus persuasively contend the burden of meeting any second element could rarely be met. Farm Br. 14-15.

the beneficiaries are not mere members of the public. *E.g., Iacampo v. Hasbro, Inc.,* 929 F.Supp. 562, 578, 580-81 (D.R.I. 1996) (employer's promise to state it would not discriminate against women or disabled in employment may be enforced by employee injured by breach, if state "specifically had her [class] in mind"); *New York Citizens Committee on Cable TV v. Manhattan Cable TV, Inc.,* 651 F.Supp. 802, 815-17 (S.D.N.Y. 1986) (subscribers were intended beneficiaries of promises made to city by cable television company, because each enjoys "special benefit . . . in contrast to any benefit he enjoys as a member of the public generally").[14]

Furthermore, the District is not the type of "government" which would trigger any second element. It has been called a "middleman," and a district has been referred to as a "surrogate" or "intermediary." Pet. Br. at 44.[15] The District asserts it is not a "mere pass-through" entity. WWD Br. 39, 41. But it does not distinguish the cited authority, nor offer any to the contrary.

Petitioners also cited *Ball v. James,* 451 U.S. 355, 366-72 (1981) (districts are public entities only in "nominal" sense), and *Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 728-29 (1973) (district does not exercise "normal governmental" authority). Pet. Br. 44-45. The District responds *Ball* and *Salyer* expressed "institutional respect" for water districts. WWD Br. 39-40. That does not alter the fact their governmental powers are limited. The

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[14] *Accord*: *Koch v. Consolidated Edison Co. of New York, Inc.*, 62 N.Y.2d 548, 559, 468 N.E.2d 1, 7 (1984), *cert. denied*, 469 U.S. 1210 (1985); *Zigas v. Superior Court*, 120 Cal.App.3d 827, 834-40, 174 Cal.Rptr. 806, 809-13 (1981), *cert. denied*, *Sangiacomo v. Zigas*, 455 U.S. 943 (1982).

[15] The Secretary of Interior referred in 1926 to a district as a "medium" for conducting financial dealings between farmers and the Bureau. H.R. Rep. No. 69-617, at 12, 16 (1926) (letters from Secretary Work to Chairman of Committee on Irrigation and Reclamation).

District also contends it is a "real" government, as it was formed under state law, is a public agency of the state, and may exercise powers such as eminent domain and issuance of general obligation bonds. WWD Br. 37-38, 41. But it has a "special limited purpose." *Salyer,* 410 U.S. at 728. Water functions are its "primary purpose." *Ball,* 451 U.S. at 364. Its reason for being is to "protect" and "serve" its farmers' property interests. *Henderson*, 53 Fed.Cl. at 50.

(3) Finally, if there were a second element, and if it applied here, the parties to the 1963 contract did intend that farmers would have enforcement rights. They referred in three articles to "those" or "anyone" having or claiming a right or remedy "through, or under" the District. JA 41, 43, 44. Respondents identify no such persons, nor do they defend the Ninth Circuit's conclusion that the only such persons are assignees. Pet. Br. 30-31.[16]

Paragraph 3 of the 1986 stipulated judgment definitively confirms farmers' enforcement rights. It declares that "any other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of . . . any

[16] The Bureau argues the Court should be "reluctant" to recognize intended beneficiary status absent "express" provision in the contract, citing this Court's jurisprudence on private rights of action under statutes, *e.g., Gonzaga University v. Doe,* 536 U.S. 273, 279-84 (2002). Bur. Br. 32-33. This argument is faulty. Such cases do not involve suits against the United States for breach of a commercial contract. In that context, intended beneficiary status may be implied. *German Alliance,* 226 U.S. at 232 (reviewing claim raised by "implication"); *Schuerman,* 30 Fed.Cl. at 433 (proper test is express or "implied" intention, citing *German Alliance*). It may be found in surrounding circumstances. *Hendrick v. Lindsay,* 93 U.S. 143, 147 (1876) (language should be considered in connection with "surrounding circumstances"). Federal supply contracts are construed and enforced like private contracts. *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604, 608-09 (2000); *United States v. Winstar*, 518 U.S. 839, 887 n.32, 895 n.39 (1996) (Souter, J., plurality), 912 (Breyer, J., concurring).

contract or other right or obligation arising independently of this Judgment . . ." JA 110. As stated in the court-approved settlement notice, this makes rights of pre-merger area farmers under the 1963 contract "directly enforceable." AER 27/528.

The Bureau suggests the phrase "any contract or other right or obligation" may not refer to the 1963 contract. Bur. Br. 45. No basis for this casual suggestion exists. A review of the judgment and the settlement notice reveals that paramount among the obligations referred to in Paragraph 3 were those owed under that contract.[17]

E. *Prior Judgments Preclude the Bureau From Challenging Intended Beneficiary Status*

The Bureau is barred from denying intended beneficiary status by several prior adjudications under the doctrines of issue preclusion, *United States v. Stauffer Chemical Company,* 464 U.S. 165, 168-69 (1984); *Durfee v. Duke,* 375 U.S. 106, 110-12, 116 (1963); *United States v. Moser,* 266 U.S. 236, 241-42 (1924), and claim preclusion, *Nevada,* 463 U.S. at 128-35; *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 378 (1940), *reh'g denied*, 309 U.S. 695 (1940). Pet. Br. 48-49.

The Bureau claims Paragraphs 3 and 4.2 of the 1986 stipulated judgment are not issue-preclusive, because the parties resolved the issue "without reaching the merits." Bur. Br. 47. The judgment did reach the merits. Paragraph 4.2

[17] NRDC argues the opening clause of Paragraph 3 limits enforcement rights to specific performance. NRDC Br. 50. The words on which it relies precede, and those on which petitioners rely follow, the word "provided." *Quackenbush v. United States,* 177 U.S. 20, 26 (1900) (proviso modifies main clause). Furthermore, the proviso here allows "any other appropriate relief," which surely includes the default remedy of damages. *Winstar,* 518 U.S. at 885 (Souter, J., plurality), 919-20 (Scalia, J., concurring).

confirmed the admittedly required intent to benefit the farmers. If enforcement rights were a second element, and it was applicable, Paragraph 3 expressly confirmed them.

As to claim preclusion, the Bureau contends the claims asserted in prior cases "differed" from those asserted here. Bur. Br. 46-47. In fact, the prior claims also alleged overcharges or failures to provide service. The Bureau further argues the prior litigations "sought enforcement of the 1986 Judgment" and, therefore, this case is "unlike" them. Bur. Br. 48-49. A suit to enforce the contract and a motion to enforce the judgment (which commands the Bureau to perform the contract) charge breach of the same quantity and price obligations.[18]

II. CONGRESS DID NOT ABROGATE THE INTENDED BENEFICIARY RULE IN SECTION 46 OF THE 1926 ACT

Section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e, provided, in part, as follows: "No water shall be delivered . . . until a contract . . . shall have been made with an irrigation district . . . organized under State law providing for payment by the district . . . of the cost of . . . the works . . ." The Bureau assumes, without demonstrating, the 1963 contract was made under Section 46. It claims the statute "expressly limits" its "authority" to create intended beneficiary status, and such status is "inconsistent with Congress's objective" in requiring district contracts. Bur. Br. 17-20. This alternative defense was neither raised nor ruled upon below. It is also erroneous.

[18] The Bureau argues the farmers "waived" their preclusion argument "by failing to present it to the district court." Bur. Br. 46. In fact, the farmers presented preclusion twice. ASSER 1/1, 11-12, 13-14, 14-16, 16-18, 30; 2/3-4.

A. *Neither the Language Nor Legislative History of Section 46 Supported Abrogation*

The language of Section 46 said nothing explicit about the intended beneficiary rule, nor did it expressly limit any rights arising from a district contract or any remedies for its breach.

Section 46 required the Bureau to make a "contract" with a district. Where Congress uses a legal term with settled meaning under common law, a court must infer, unless otherwise specified, Congress incorporates that meaning. *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) ("conspiracy"); *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("conversion"); *State Engineer v. South Fork Band*, 339 F.3d 804, 813-14 (9th Cir. 2003) ("jurisdiction"). The term "contract" at common law embraces the intended beneficiary rule. A court will not infer a Congressional statute abrogates a common law contract rule. *United States v. Texas*, 507 U.S. 529, 534-35 (1993) (act does not relieve promisor of common law duty to pay prejudgment interest); *Cecile Industries, Inc. v. Cheney*, 995 F.2d 1052, 1054-56 (Fed.Cir. 1993) (same act does not abrogate common law contractual offset rights). Here, nothing in Congress' use of the word "contract" implied an intent to abrogate any contract rule, including the intended beneficiary rule. Instead, Congress intended to incorporate the entire law of contract.

The purpose of Section 46 was simply to provide for "payment" by a district of the "cost" of the project, with such "costs" being "repaid" within a certain time. 43 U.S.C. § 423e. The change was designed to make the liability of every farmer joint. WWD Br. 17, 19; NRDC Br. 30-31 n.14. Section 46 did not refer to the water delivery side of a contract.[19]

[19] The District argues this action is "collaterally attacking" its litigation decisions. WWD Br. 5-6, 24, 35, 42. Petitioners' suit does not challenge any litigation decisions of the District in this or any other case. It also

Courts which addressed the purpose of contracting with a district concluded it is "convenience" and "administrative expediency." Pet. Br. 33-34. Section 48 of the 1926 act, 43 U.S.C. § 423f, stated its purpose was rehabilitating projects and placing them on a sound operative and business basis. *Yellen v. Hickel,* 335 F.Supp. 200, 204 (S.D.Cal. 1971), *rev'd on other grounds,* 559 F.2d 509 (9th Cir. 1977), *on reh'g,* 595 F.2d 524 (9th Cir. 1979), *rev'd and vacated in part sub nom., Bryant,* 447 U.S. 352, found its purpose was to provide relief to settlers, not to change the policy of reclamation law. This authority is not addressed by respondents.[20]

B. *The 1963 Contract Was Made Under Section 9(e) of the 1939 Act*

Congress authorized the Bureau to make water service contracts in Section 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(e). Respondents acknowledge the 1963 contract is a Section 9(e) contract. Bur. Br. 5-6 n.2; NRDC Br. 6, 47. However, respondents insist that, even after 1939, the Bureau's authority was limited to contracting "only" with a district. Bur. Br. 4, 5-6 n.2, 7, 17; WWD Br. 16, 34; NRDC Br. 30-31.

Section 9(e) of the 1939 act authorizes the Bureau "[i]n lieu of entering a repayment contract" to enter "contracts to furnish water for irrigation purposes." 43 U.S.C. § 485h(e).

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claims its "discretion regarding which landowners will receive what amount of water" might be impaired. WWD Br. 24, 35. Recognizing intended beneficiary status in a suit against the Bureau would have no effect on the District's internal allocation powers, which are defined by state law. Cal. Water Code §§ 23200, 35421, 37856; *Ivanhoe,* 53 Cal.2d at 709-11.

[20] The Bureau's attempts to raise lack-of-authority defenses in reclamation contract cases have previously been rejected. *E.g., United States v. Coachella Valley County Water District,* 111 F.Supp. 172, 179, 180 (S.D.Cal. 1953); *Central Arizona Water Conservation District v. United States,* 32 F.Supp.2d 1117, 1141, 1143 (D.Ariz. 1998).

It does not direct the Bureau to contract with a district. It authorizes the Bureau to make a service contract with "private landowners or organizations." *Flint v. United States,* 906 F.2d 471, 475 (9th Cir. 1990) (Bureau contracts with landowners to furnish irrigation water).[21] Nothing in Section 9(e) suggests Congress intended to limit the Bureau's authority to make farmers intended beneficiaries. Indeed, it was given authority to make service contracts directly with farmers.[22]

III. NEITHER OF THE APPLICABLE SOVEREIGN IMMUNITY WAIVER STATUTES BARS SUITS BY INTENDED BENEFICIARIES

Petitioners claim sovereign immunity was waived under both Section 208(a)(2) of the Act of July 10, 1952, 43 U.S.C. § 666(a)(2), and Section 221 of the Reclamation Reform Act of 1982, 43 U.S.C. § 390uu. Respondents argue that, even if petitioners are intended beneficiaries, those statutes do not waive immunity. Bur. Br. 20-25; WWD Br. 24-25, 43-47; NRDC Br. 14-23.

Generally, statutes waiving immunity for contract claims are construed to embrace intended beneficiary claims. For

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[21] In 1956, Congress further directed, in administering the 1939 act, the Bureau shall provide the other "party" to a service contract shall have a first right to a stated quantity of water for use on irrigable lands "within the boundaries of, or owned by," the party. 43 U.S.C. § 485h-1(4).

[22] The 1979-1986 litigation involved underdelivery and overcharge claims under the 1963 contract by farmers against the Bureau. Two subsequent suits raised claims under its price terms. *Barcellos & Wolfsen, Inc. v. Westlands Water District,* 899 F.2d 814, 816, 824-25 n.17 (9th Cir. 1990), *cert. denied, Boston Ranch Co. v. Department of Interior,* 498 U.S. 998 (1990); *United States v. Westlands Water District,* 134 F.Supp.2d 1111, 1117-18, 1138-39 (E.D.Cal. 2001). Two others involved claims under its service terms. *O'Neill,* 50 F.3d at 682; *Sumner Peck Ranch, Inc. v. Bureau of Reclamation,* 823 F.Supp. 715, 745 (E.D.Cal. 1993). In none of these cases did the Bureau raise its novel Section 46 defense. Thus, respondents' argument is barred by claim preclusion.

example, the claims court has long entertained claims against the United States founded upon any express or implied contract. 28 U.S.C. § 1491(a)(1). This statute is construed to allow suits by intended beneficiaries. *E.g., Maneely v. United States,* 68 Ct.Cl. 623, 629 (1929). Similarly, certain such contract claims may be brought in district court. 28 U.S.C. § 1346(a)(2). This statute, too, embraces intended beneficiary claims. *E.g., United States v. Huff,* 165 F.2d 720, 723-24, 725 (5th Cir. 1948).[23]

A. *Section 208(a)(2) of the 1952 Act Does Not Bar Petitioners' Suit*

In Section 208(a)(2) of the 1952 act, consent is given to join the Bureau as a defendant "in any suit . . . for the administration" of previously adjudicated "rights to the use of water" of a source where it acquires water rights by appropriation under state law. NRDC argues this statute does not extend to petitioners' claims. NRDC Br. 11,12,14 n.6, 18-19.

The previously-adjudicated water rights covered by Section 208(a)(2) are "all-inclusive." *United States v. District Court,* 401 U.S. 520, 524 (1971). Furthermore, a suit for the administration of such rights includes any proceeding to interpret or enforce them. *E.g., Federal Youth Center v. District Court,* 195 Colo. 55, 60-62, 575 P.2d 395, 398-400 (1978); *United States v. Hennen,* 300 F.Supp. 256, 263-64 (D.Nev. 1968). The statute is presumed not to repeal by implication any of the common law's deeply-rooted doctrines. *South Fork Band*, 339 F.3d at 814. Indeed, in the litigation resolved by the 1986 stipulated judgment, the court held that Section 208(a)(2) waived immunity. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 491 F.Supp. 263, 266 n.2, 267 (E.D.Cal. 1980). Accordingly, petitioners'

[23] One court has similarly assumed without deciding that the word "contractor," as used in 41 U.S.C. § 601(4), includes an intended beneficiary. *Hodgdon v. United States*, 919 F.Supp. 37, 39 n.2 (D.Maine 1996).

claims are within the scope of that waiver.

B. *Section 221 of the 1982 Act Does Not Bar Petitioners' Suit*

In Section 221 of the 1982 act, Congress consented to suit to adjudicate "the contractual rights" of a "contracting entity" and the Bureau regarding any "contract" executed under reclamation law. It was intended to provide a "broad" waiver of immunity. *Tacoma v. Richardson,* 163 F.3d 1337, 1340 (Fed. Cir. 1998); *Westlands,* 134 F.Supp.2d at 1156 n.97.[24] It, too, incorporates the federal common law of contract, including the intended beneficiary rule. *Texas,* 507 U.S. at 534.

The legislative history of Section 221 shows it was intended to extend consent to farmers within a district. Pet. Br. 12 n.24. Respondents disagree, citing *Wyoming v. United States,* 933 F.Supp. 1030, 1039 (D.Wyo. 1996). Bur. Br. 22; WWD Br. 45 n.28. The claimant there was not a farmer within the contracting district, but a neighboring district. Furthermore, Representative Miller, in support of the Conference Committee Report, stated: "This new law also permits landowners to sue the United States by waiving sovereign immunity." 128 Cong. Rec. H7987 (September 29, 1982).[25] This issue has been resolved against the Bureau. *Sumner Peck Ranch*, 823 F.Supp. at 746.

Respondents also argue Section 221 only allows a party to join the Bureau in a "ongoing" suit between a district and its members. Bur. Br. 21-23; NRDC Br. 15-20. The argument

[24] "In making these contracts, the Government is acting in a proprietorial capacity and not in a sovereign capacity and there is no reason why it should be permitted to defeat a valid claim by pleading sovereign immunity." 128 Cong. Rec. H1832 (May 5, 1982) (Rep. Kazen).

[25] The House and Senate versions of the bill had the same intent: "Even though we substituted language which was taken from the House bill, that sentiment and purpose is still applicable to the House language . . ." 128 Cong. Rec. S8507 (July 16, 1982) (Sen. McClure).

has been made before, and rejected. *Sumner Peck Ranch*, 823 F.Supp. at 745-46. Any such reading of the first sentence is "belied" by the second, which waives immunity when the Bureau is a "party to any suit." *Id.* at 745.

Respondents finally argue Section 221 does not extend to claims seeking money damages. Bur. Br. 23-25; NRDC Br. 20-21. Again, this contention has been rejected. *Sumner Peck Ranch*, 823 F.Supp. at 746-47. The language of the statute (Bureau subject to judgments "in the same manner as a private individual under like circumstances") embraces any remedy. *Id.* at 746. Indeed, the House-Senate conferees agreed Section 221 is not prejudicial to "any particular . . . remedy under existing law." H.R. Conf. Rep. No. 97-855, at 33 (1982).[26]

CONCLUSION

The Court should reverse the holdings below (a) determining petitioners are not entitled to sue and (b) vacating the partial merits rulings, and it should remand the case to the Ninth Circuit with direction to review, or otherwise dispose of, the partial merits rulings.

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[26] In the 1979-86 litigation the court explicitly held farmers could sue the Bureau for underdelivery and overcharge claims under Section 208(a)(2). *Barcellos & Wolfsen*, 491 F.Supp. at 266 n.2, 267. In a subsequent case, the court held farmers had standing under Section 221, their suit need not be an ongoing action against the District, and they could seek money damages. *Sumner Peck Ranch*, 823 F.Supp. at 746-47. Thus, the Bureau may not relitigate either sovereign immunity defense here. Furthermore, claim preclusion bars the government from a belated assertion of sovereign immunity. *United States v. County of Cook*, 167 F.3d 381, 385-90 (7th Cir. 1999), *cert. denied*, 528 U.S. 1019 (1999). The Bureau is so barred, because it failed to assert its immunity defenses in several prior cases.

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In The Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE STATE OF CALIFORNIA BY AND THROUGH THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE*

Amicus Curiae the State of California by and through the California State Water Resources Control Board submits this brief supporting respondents; all parties have consented to its filing.[1]

INTERESTS OF THE *AMICUS CURIAE*

The State of California has an important interest in the proper application of its water laws. "The present and future well-being and prosperity of the state depend upon the conservation of its life-giving waters." *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 701 (1933). "All water within the State [of California] is the property of the people of the State, but the right to use of the water may be acquired by appropriation in the manner provided by law." California Water Code §102.

In support of their argument that they are intended third-party beneficiaries of the contract between the U.S. Bureau of Reclamation and the Westlands Water District, Petitioners claim an equitable property right in the water they receive from the U.S. Bureau of Reclamation, and claim that the property right is appurtenant to their land. Petitoners' Brief on the Merits, p. 36. This is incorrect.

The State through the California State Water Resources Control Board in Revised Water Rights Decision

[1] No counsel for any party to the case authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* contributed financially to the preparation of this brief. *See* S.Ct. Rule 37.6.

1641[2] (D-1641), has expressly rejected the trust and appurtenance water right theories advanced by Petitioners. Revised Water Rights Decision 1641, pp. 91, 126-130 (Cal. St. Water Res. Control Bd. 2000) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf. A California trial court, Sacramento County Superior Court, has upheld the California State Water Resources Control Board's reasoning under those portions of D-1641. *St. Water. Res. Control Bd. Cases, Coord. Special Proc.* No. JC 4118, Statement of Decision at 41-49 (Cal. Superior Ct. May 5, 2003), available at http://www.saccourt.com/CoordCases/swrcb/orders/SWRCBCaseDecision5-5-03.PDF. Westlands Water District was a party to that trial court proceeding. *Id., at* p. 1. Decision 1641 is currently under consideration by the California Court of Appeal, Third Appellate District, in *Coordinated Special Proceeding Special Title (Rule 1550(b)) State Water Resources Control Board*, Third Appellate District Case No. C044714.

To the extent that the Court's determination of the question presented turns on application of California water rights law, the State of California has an important interest in the Court's proper understanding and application of that law, so that nothing in the Court's opinion does harm to the State of California's authority to administer its system of water rights and to protect the State's water resources for all its people.

---

[2] D-1641 implements the water flow objectives contained in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, and approves changes to points of diversion, place of use, and purpose of use for the Central Valley Project. Revised Water Rights Decision 1641, p. 1 (Cal. St. Water Res. Control Bd. 2000) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf.

SUMMARY OF ARGUMENT

Petitioners have invited the Court to determine whether they are intended third-party beneficiaries to a contract between the United States Bureau of Reclamation and the Westlands Water District by analyzing, in part, California water rights law to define the legal relationship between the United States Bureau of Reclamation, the Westlands Water District, and the Petitioners – individual farmers who make up the Westlands Water District. *See* Petition for a Writ of Certiorari, pp. 22, 25; Petitioners' Brief on the Merits, pp. 34-41. Petitioners erroneously claim that under California law individual farmers who receive water from a special purpose district "equitably own the water right under the law of prior appropriation, and it [the water right] is appurtenant to their lands." Petitioners' Brief on the Merits, p. 36. *Amici Curiae* Central San Joaquin Water Conservation District erroneously claims that "Petitioners hold water rights that entitle them to receive all the water from the reclamation project that they can beneficially use." Brief *Amici Curiae* of Central San Joaquin Water District in Support of Petitioner, p. 20.

These contentions do not accurately describe Petitioners' interest under California law in receiving water from the Bureau of Reclamation. Under California law Petitioners do not have an equitable property right in the water they receive from the Bureau of Reclamation. *Ivanhoe Irrigation District v. All Parties (Ivanhoe II)*, 53 Cal.2d 692, 715-716 (1960).

California's law of appurtenance does not establish any property interest in this case. Rather the state's law of appurtenance establishes a limitation on the place of use

of water, and may recognize an easement on real property when the owner of real property also owns an associated water right. California Water Code §§1260(f) & 1701; *Stanislaus Water Co. v. Bachman,* 152 Cal. 716, 724 (1908). In this case, the United States, not the Petitioners, holds the permit for the water rights at issue. Westlands Excerpts of Record, filed 6/25/01, p. 233. And the contract between the Westlands Water District and the Bureau of Reclamation creates no easement in the water delivered to Petitioners. Joint Appendix On Writ of Certiorari, pp. 27-92.

Therefore, under California law Petitioners have no property interest in the water they receive from the Bureau of Reclamation. California Water Code §§1260(f) & 1701; *Stanislaus Water Co. v. Bachman,* 152 Cal. at 724.

Finally, Petitioners and *Amici Curiae* Central San Joaquin Water Conservation District cite *Ickes v. Fox*, 300 U.S. 82 (1937), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Nevada v. United States*, 463 U.S. 110 (1983), to establish a property right to the use of surface water at issue in this case for irrigation appurtenant to the land, subject to beneficial use. *See* Petitioners' Brief on the Merits, pp. 37-41; Brief *Amici Curiae* of Central San Joaquin Water District in Support of Petitioner, pp. 20-21. *Amici Curiae* describe this law as a body of "Western water law." *Id.* at p. 20.

However, so called Western water law is not a uniform body of law. Rather it is made up of the distinct water laws of the individual western states. In *Ickes, Nevada,* and *Nebraska*, the Court's conclusions were based on application of the water laws of those individual States, and federal reclamation law, not a general body of so called

Western water law. *Ickes*, 300 U.S. at 93-94; *Nebraska,* 325 U.S. at 599-600, 611-615; *Nevada*, 463 U.S. at 121-127.

Under the federal law of the Central Valley Project Improvement Act, section 8 of the Reclamation Act, and *California v. United States*, 438 U.S. 645, 674-679 (1978) Petitioners have no vested property interest in the water they receive from the Bureau of Reclamation which is appurtenant to their land. Central Valley Project Improvement Act, Pub.L. No. 102-575, 106 Stat. 4600, §3411(a) (October 30, 1992); 43 U.S.C. §372; *California v. United States*, 438 U.S. at 674-679.

Because, under either federal or California law, Petitioners do not have a vested property interest in the water they receive, the Court should not now use the *Ickes* line of cases as a basis for establishing a property interest in California water inconsistent with Petitioners' rights under California water rights law.

ARGUMENT

I. UNDER CALIFORNIA LAW PETITIONERS' INTEREST IN THE WATER THEY RECEIVE FROM THE BUREAU OF RECLAMATION IS NOT AN EQUITABLE PROPERTY RIGHT APPURTENANT TO THEIR LANDS

A. CALIFORNIA DOES NOT RECOGNIZE THE TRUST THEORY ADVANCED BY PETITIONERS

Petitioners claim an equitable property right in the water they receive from the Bureau of Reclamation under California water law of prior appropriation. Petitioners' Brief on the Merits, p. 36. This is an erroneous characterization of

Petitioners' interests in the water they receive from the Bureau of Reclamation. Petitioners do not cite any law, California or otherwise, to support their statement of an equitable property interest. *Id.* at p. 36. Presumably they intend to rely on the land owner "trust" theory articulated by the California Supreme Court in *Ivanhoe Irrigation District v. All Parties* (*Ivanhoe I*), 47 Cal.2d 597 (1957) and overruled by *Ivanhoe v. McCracken*, 357 U.S. 275 (1958).

In *Ivanhoe I* the California Supreme Court held that the Bureau of Reclamation holds the water rights secured by the Federal Central Valley Project in trust for the benefit of the beneficiaries of that trust – individual water users of the state like the Petitioners in this case. *Id.*, 47 Cal.2d at 627-628. The Court overruled *Ivanhoe I* in *Ivanhoe v. McCracken*, 357 U.S. 275. On remand, the California Supreme Court expressly repudiated the trust theory that it had carefully set forth in *Ivanhoe I*. *Ivanhoe II*, 53 Cal.2d at 715-716.[3] "Thus the trust theory is not the law of this case, is dicta, and for that reason should not be construed as a statement of the law of California." *Id.*

[3] The California State Water Resources Control Board has rejected the land owner trust theory in Decision 1641. Revised Water Rights Decision 1641, pp. 126-127 (Cal. St. Water Res. Control Bd. 2000) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf. The Sacramento Superior Court, a California trial court, has upheld that portion of the State Board's reasoning under D-1641. *St. Water. Res. Control Bd. Cases, Coord. Special Proc.* No. JC 4118, Statement of Decision at 47-49 (Cal. Superior Ct. May 5, 2003), available at http://www.saccourt.com/CoordCases/swrcb/orders/SWRCBCaseDecision5-5-03.PDF. This issue is currently under consideration by the California Court of Appeal, Third Appellate District, in *Coordinated Special Proceeding Special Title (Rule 1550(b)) State Water Resources Control Board*, Third Appellate District Case No. C044714.

B. PETITIONERS HAVE NO REAL PROPERTY INTEREST APPURTENANT TO THEIR LAND

Petitioners also claim that their interest in the water is appurtenant to their land, and that this means they have a real property right in the water. Petitioners' Brief on the Merits, p. 36. Petitioners' reference to the concept of appurtenance does not establish a property interest under California law in the water they receive from the Bureau of Reclamation.

In California, the appurtenance theory is a restraint on out-of-project transfers of Central Valley Project water and not a basis for establishing a property interest in water Petitioners receive from the Bureau of Reclamation. California's appurtenance concepts establish that an appropriative right has an authorized place of use. California Water Code §1260(f). To change that authorized place of use, a water right holder must obtain permission from the California State Water Resources Control Board. California Water Code §§1701, *et seq*.

Water Code section 1702 states as follows:

> Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the [California State Water Resources Control] board, and it shall find, that the change will not operate to the injury of any legal users of the water involved.

California Water Code §1702.

"Section 1702 codifies the common law 'no injury' rule that an appropriator can make a change in its water right so long as the change is not injurious to other water right holders." Revised Water Right Decision 1641, at p. 91 (Cal.

St. Water Res. Control Bd. 2000) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf (citing *City of San Bernadino v. City of Riverside*, 186 Cal. 7, 28 (1921), Code Commission Notes to Water Code §1700, Hutchins, The California Law of Water Rights (1956) pp. 176-177, Final Report, Governor's Commission to Review California Water Rights (1978) pp. 64-65). The legislative history of Water Code section 1702 indicates that "the legislature, in using the concept 'legal user,' did not intend to include those persons who use water provided under contract with a water supplier entity, such as the Central Valley Project." *St. Water. Res. Control Bd. Cases, Coord. Special Proc.* No. JC 4118, Statement of Decision at 46, *see* discussion 43-46 (Cal. Superior Ct. May 5, 2003), available at http://www.saccourt.com/CoordCases/swrcb/orders/SWRCBCaseDecision5-5-03.PDF.

Although Petitioners' land may be a designated place of use for the water they receive from the Bureau of Reclamation, it does not follow that under California water rights law, the Petitioners have a real property interest in that water even if the Court were to consider them to be a "legal user" of water under section 1702.[4]

[4] The California State Water Resources Control Board has rejected the argument that contractors who receive water from the Central Valley Project are legal users of water under California Water Code section 1702. Revised Water Rights Decision 1641, pp. 129-130 (Cal. St. Water Res. Control Bd. 2000) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1641.pdf. The Sacramento Superior Court, a California trial court, has upheld this portion of the State Board's reasoning under D-1641. *St. Water. Res. Control Bd. Cases, Coord. Special Proc.* No. JC 4118, Statement of Decision at 46, *see* discussion 43-46 (Cal. Superior Ct. May 5, 2003), available at http://www.saccourt.com/CoordCases/swrcb/orders/SWRCBCaseDecision5-5-03.PDF. This issue is currently under consideration by the California Court of Appeal,

(Continued on following page)

California appurtenance theory also establishes that conveyance of real property may include the conveyance of a water right associated with that property. *Senior v. Anderson*, 138 Cal. 716, 723 (1903). Under certain circumstances, a water right, when acquired, can become an easement appurtenant to the land upon which the water is used and may be passed with possession and title to the land. *Stanislaus Water Co. v. Bachman*, 152 Cal. at 724-725. In *Stanislaus Water Co.* the terms of the contract between the private water company and an individual landowner included terms that expressly made the right to receive water "a covenant to and with the said land." *Stanislaus Water Co.*, 152 Cal. at 720. California's law of appropriative rights does not, however, require that the appropriator of water own the land upon which the water will be used. *See generally*, Hutchins, The California Law of Water Rights (1956) pp. 70-71. Consequently, an appropriator can appropriate water in order to provide it to another. *Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 34 (1929).

In this case, the United States Bureau of Reclamation is the permit owner for the water right at issue.[5] Westlands

Third Appellate District, in *Coordinated Special Proceeding Special Title (Rule 1550(b)) State Water Resources Control Board*, Third Appellate District Case No. C044714.

[5] To the extent that Petitioners may argue that the terms of the permits issued to the United States contain terms that create a property right appurtenant to their land, they are incorrect. *See* Petitioners' Brief on the Merits, p. 6. The Water Rights Decisions cited by Petitioners, D-893, D-990, and D-1020, contain language that the right "is subject to continued beneficial use and the right to change the point of diversion, place of use, and purpose of use." Decision D-893, p. 73 (Cal. St. Water Res. Control Bd. 1958) available at http://www.waterrights.ca.gov/hearings/decisions/WRD893.PDF, Decision D-990,

(Continued on following page)

Excerpts of Record, filed 6/25/01, p. 233. The contract between the Bureau of Reclamation and Westlands Water District does not include a term which establishes an easement running with Petitioners' land. Joint Appendix On Writ of Certiorari, pp. 27-92. Rather the Central Valley Project Improvement Act follows California law regarding change of place of use, allowing the Bureau to change the place of use if it complies with California law. Central Valley Project Improvement Act, Pub.L. No. 102-575, 106 Stat. 4600, §3411(a) (Oct. 30, 1992).

The question remains under California law what is the nature of Petitioners' interest in the water they receive from the Bureau of Reclamation. Petitioners have no property interest in the water right held by the Bureau of Reclamation. Petitioners have merely a contractual interest in receiving a portion of the water appropriated by the United States through its water right permit. *See, Consolidated Peoples Ditch Company v. Foothill Ditch Co.*, 205 Cal. 54, 62-64 (1928); *Erwin v. Gage Canal Co.*, 226 Cal.App.2d 189, 194 (1964).

Petitioners' interest is defined and limited by their legal relationship with the Westlands Water District under California Water Code §§34000, *et seq.*, 35420, *et seq.* & 37800, *et seq.*, and the terms of the contracts which were fairly negotiated between the Westlands Water District

p. 88 (Cal. St. Water Res. Control Bd. 1961) available at http://www.waterrights.ca.gov/hearings/decisions/WRD990.PDF, Decision D-1020, p. 23 (Cal. St. Water Res. Control Bd. 1961) available at http://www.waterrights.ca.gov/hearings/decisions/WRD1020.PDF. The permits clearly contemplate the change of place of use under state law, which is inconsistent with Petitioners' theory of a vested water right in the water they receive from the Bureau of Reclamation.

and the Bureau of Reclamation. Joint Appendix On Writ of Certiorari, pp. 27-92. *See, Consolidated Peoples Ditch Company*, 205 Cal. 54, 62-64; *City of Glendale v. Cresenta etc. Water* Co., 135 Cal.App.2d 784, 801-802 (1955). Petitioners have no other California common law-based property interest in the water they receive from the Bureau of Reclamation.

II. THE COURT SHOULD NOT RELY ON THE *ICKES* LINE OF AUTHORITY TO GIVE PETITIONERS AN EQUITABLE PROPERTY RIGHT IN THE WATER THEY RECEIVE FROM THE BUREAU OF RECLAMATION WHICH WOULD CONFLICT WITH CALIFORNIA WATER LAW

Ickes, 300 U.S. 82, *Nebraska*, 325 U.S. 589, and *Nevada*, 463 U.S. 110, do not give Petitioners a property right in the water they receive from the Bureau of Reclamation. *See* Petitioners' Brief on the Merits, pp. 37-41; Brief *Amici Curiae* of Central San Joaquin Water District in Support of Petitioner, pp. 20-21. *Amici Curiae* describe these cases as a body of "Western water law." *Id.* p. 20. Western water law is not a uniform body of law. Rather it is made up of the distinct water laws of the individual western states.

The *Ickes* line of authority does not give Petitioners a property interest in the water they receive from the Bureau of Reclamation inconsistent with their rights under California water law.[6] In *Ickes* the Court held that

[6] Petitioners identify a body of federal common law that applies to reclamation contracts between the Bureau of Reclamation and individual water districts. *See* Petitioners' Brief on the Merits, p. 23, citing *Ivanhoe Irrigation District v. McCracken*, 357 U.S. at 289. In *Ivanhoe*

(Continued on following page)

the United States was not an indispensable party to a lawsuit brought by farmers in Washington against the Bureau of Reclamation. *Ickes*, 300 U.S. at 96-97. In concluding that the United States did not become the owner of water rights at issue, the Court relied on Section 8 of the Reclamation Act, 42 U.S.C. §372, and Washington state law. *Ickes*, 300 U.S. at 93-94. The applicable Washington state law provided that:

> The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used.

300 U.S. at 94, fn.3 citing Laws of Wash., 1917, c.117, §39, p. 465; Laws of Wash., 1929, c.122, §6, p. 274, Rem.Rev.Stat. §7391, vol. 8, p. 425.

In *Nebraska* and *Nevada* the Court followed the same basic analysis as it utilized in *Ickes* looking to applicable federal statutory and state law to determine the existence and nature of the property interest at issue in those cases. *Nebraska,* 325 U.S. at 599-600, 611-615; *Nevada*, 463 U.S. at 121-127.

In the context of a specific appurtenance requirement under Nevada law, similar to the state of Washington requirement analyzed in *Ickes*, the Court stated:

> [W]e conclude that the government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree of 1944 for

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the Court referred to federal common law to interpret rights and obligations under the contract, not to determine any property interest in water rights separate from the contract terms. *Ivanhoe Irrigation District v. McCracken,* 357 U.S. at 289.

> use in irrigated lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted as the Government might see fit.

Nevada v. United States, 463 U.S. at 126. Unlike the Nevada and Washington law analyzed in *Ickes* and *Nevada*, California law does not treat appurtenance as meaning that an appropriative water right is inexorably tied to the land it may have originally irrigated. Consequently, in California, water subject to a water right is transferable temporarily or more permanently. *See* California Water Code §§1700, *et seq.*, 1725, *et seq.* This creates a robust water market unconnected to the original place of use of the water transferred. *Id.*

The Reclamation Act provides that California law controls the appropriation and distribution of water under the Central Valley Project unless inconsistent with express congressional directives. *California v. United States*, 438 U.S. 645, 674-679. Under California law, Petitioners have no property interest in the water right held by the United States. *Ivanhoe II*, 53 Cal.2d at 715-716. California's appurtenance provisions do not establish that the water or the appropriative water right becomes part of the land where it is used, and nothing in California's place of use limitation creates any property interest in Petitioners in the water they receive from the Bureau of Reclamation. *See* Argument sections I, A & B, above. The Central Valley Project Improvement Act follows California law in this respect and allows changes in place of use if California law is satisfied. Central Valley Project Improvement Act, Pub.L. No. 102-575, 106 Stat. 4600, §3411(a).

CONCLUSION

Therefore, based on the above, in deciding the issue presented, the State of California requests that the Court not recognize a property right under California law in the water Petitioners receive from the Bureau of Reclamation through its contract with the Westlands Water District.

Dated: January, 2005

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In The Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CENTRAL ARIZONA WATER CONSERVATION DISTRICT, MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT AND ARIZONA DEPARTMENT OF WATER RESOURCES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Three of the *amici curiae* are defendants in lawsuits filed by a small group of farmers in two central Arizona irrigation districts claiming that they are intended beneficiaries of the districts' Central Arizona Project ("CAP") Agricultural subcontracts for Colorado River water. The lawsuits seek to prevent their irrigation districts from relinquishing high-priced long-term subcontract water for low-cost, medium-term water contracts. The relinquishment of the subcontract water is an essential element of the comprehensive and landmark settlement of CAP water allocations and repayment obligations and water rights claims of two major Arizona Indian communities ("Settlement"). The Settlement is embodied in and authorized by the recently enacted Arizona Water Settlements Act, P.L. 108-451 ("Settlements Act").

One of the lawsuits filed by the farmer group is a federal action against *amicus* Central Arizona Water Conservation District ("CAWCD"), now pending on appeal in the Ninth Circuit ("Federal Case"). The other is a state

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[1] Because the Central Arizona Water Conservation District, the Maricopa-Stanfield Irrigation & Drainage District and the Central Arizona Irrigation and Drainage District are political subdivisions and municipal corporations of the State of Arizona, they are not required to obtain consents of the parties to the filing of this brief, and are not required to make disclosures under U.S. Sup. Ct. R. 37.4, 37.6. Ariz. Rev. Stat. Ann. §§ 48-3702, 48-2901; Ariz. Const. art. 13, § 7. The Arizona Department of Water Resources is the agency of the state with responsibilities for surface water and interstate stream matters with its own legal staff. It should qualify as a "similar entity" under Rule 37.4. However, *amici* are filing with the Court the consents of all parties. This brief was not authored in whole or in part by counsel for any party; no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

court action against *amici* Maricopa-Stanfield Irrigation & Drainage District ("MSIDD") and Central Arizona Irrigation and Drainage District ("CAIDD") that is the subject of a petition for special action recently filed with the Arizona Supreme Court ("State Case"). *See Maricopa Stanfield Irrigation & District, et al., v. Robertson,* Arizona Supreme Ct. No. CV-04-0385-5A. App. 21.

The fourth *amicus* is the Arizona Department of Water Resources (the "Department"), the agency for the State of Arizona with general control and supervision of surface water, its appropriation and distribution. Ariz. Rev. Stat. Ann. § 45-103(B).

The purpose of this *amici* brief is to support the Respondents and advise the Court that the issues presented in the State Case and Federal Case arise from facts and law that differ, in important ways, from the facts and law in *Orff*. The *Orff* Petitioners' brief is predicated on their asserted ownership of appurtenant water rights under Section 8 of the 1902 Reclamation Act. Congress, in Section 5 of the 1928 Boulder Canyon Project Act, exempted post-1928 Colorado River water rights from the application of Section 8. *Amici,* in this brief, urge the Court to recognize the important differences between the issues presented by *Orff* and the issues currently under review in the Federal Case and State Case.

Central Arizona Water Conservation District

The Central Arizona Water Conservation District is a multi-county water conservation district and a political subdivision in Arizona that has contracted with the United States for the operation and repayment of the Central Arizona Project, a federal reclamation project. *See* Ariz. Rev.

Stat. Ann. §§ 48-3701 to -3738.[2] The CAP annually delivers to water users in central and southern Arizona 1.5 million acre feet of Arizona's entitlement to Colorado River water.[3]

CAWCD was the defendant in case No. CIV 03-0505 in the United States District Court for the District of Arizona, *John E. Smith, et al. v. Central Arizona Water Conservation District*. The plaintiffs in the Federal Case (hereinafter, "Smiths") were landowners in two Arizona irrigation districts – MSIDD and CAIDD (collectively, the "Irrigation Districts"). Each of the Irrigation Districts was a party to an Agricultural subcontract with CAWCD and the United States ("Subcontract") pursuant to which the District was to purchase and receive Colorado River water through the CAP. Smiths were not parties to the Subcontracts, but asserted in the litigation that they were third-party beneficiaries. On September 12, 2003, Judge Earl H. Carroll ruled that Smiths were not third-party beneficiaries and dismissed the case. App. 1. Smiths have appealed to the Ninth Circuit, matter No. 03-16962. The appeal has been fully briefed and is currently pending before that court.

Maricopa-Stanfield Irrigation & Drainage District and Central Arizona Irrigation and Drainage District

MSIDD and CAIDD are irrigation districts in Pinal County, Arizona and are parties to long-term Agricultural

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[2] CAWCD and the Secretary in 1972 entered into a Master Repayment Contract for the delivery of Colorado River water through the CAP and for the repayment of the allocable costs of the Project. This Contract was superseded and replaced by the 1988 Master Contract. *See* App. 94, and ¶ 9 Joint Statement of Facts, App. 88.

[3] For the purposes of this brief, the term "Colorado River water" means post-1928 Colorado River water released from Hoover Dam pursuant to the Boulder Canyon Project Act of 1928.

CAP Subcontracts with the United States and CAWCD.[4] App. 159. The Subcontracts provide for the delivery of Colorado River water to the Irrigation Districts and govern the terms of its purchase by each Irrigation District. The individual landowners within the Irrigation Districts were not parties to the Subcontracts.

The farmers in the Irrigation Districts have never been able to afford to buy CAP water at the price set by the Subcontracts. For that reason, neither District has ever received any CAP water pursuant to its Subcontract. Exhibit A to CAIDD Statement of Facts, Affidavit of Paul Orme, ¶ 9, App. 205. In 1993, when construction of the CAP was completed, the Irrigation Districts advised CAWCD that they could not afford to pay the price dictated by the Subcontracts. The Irrigation Districts and CAWCD dealt with the problem by entering into ten-year Excess Water Contracts in 1994 that allowed the Districts to purchase "excess" CAP water at affordable rates. *Id.* The Irrigation Districts did receive CAP water pursuant to the Excess Water Contracts. Those agreements expired at the end of 2003. *Ibid*; CAIDD Statement of Facts, ¶¶ 16-23, App. 197-200.

In 2002, CAWCD entered into the Arizona Water Settlement Agreement ("Settlement Agreement") with the Arizona Department of Water Resources and the United

[4] The Subcontracts with the Irrigation Districts were entered into pursuant to the Master Repayment Contract. Except for the names of each District and subarticle 4.13(a) stating the amount of the Subcontractor's water entitlement, the terms of the Subcontracts of the Irrigation Districts are identical. Joint Statement of Facts, ¶ 18, App. 89.

States through the Secretary of the Interior ("Secretary").[5] App. 60. The Settlement Agreement established the processes for implementing the Settlement embodied in the Settlements Act enacted by Congress on November 17, 2004 and signed by the President on December 10, 2004. CAWCD, in December 2002 pursuant to the Settlement Agreement, adopted a new policy for marketing excess water to irrigation districts. Under this policy, the districts were offered new contracts for the purchase of excess CAP water at low rates through 2030 in exchange for relinquishment of their CAP Agricultural Subcontract allocations. Districts could retain Subcontract water rights, but no district would be allowed to purchase excess CAP water at the low price until it had ordered and paid the full price for any Subcontract water it had retained. *See* Settlement Agreement, subparagraphs 6.3, 6.4, App. 70-71.

Pursuant to the Settlement Agreement, CAWCD offered a package of benefits to each Irrigation District in exchange for relinquishment of its subcontract rights *Id.* ¶¶ 7, 8, App. 72-75. Both of the Irrigation Districts held elections to determine whether landowners favored the District's relinquishment of subcontract water rights in return for the various benefits that were offered. A majority of the votes cast in each of the Irrigation Districts favored the proposed relinquishment. CAIDD Statement of Facts, Affidavit of Paul Orme, ¶¶ 18, 24, App. 207-208.

In 2001, Smiths with approximately thirty-nine other landowners, filed a civil action in the Pinal County Superior

[5] While the United States did not execute the Settlement Agreement in 2002, the Settlements Act authorizes and directs the Secretary to execute the Settlement Agreement. *See* § 2 (34), § 106(a)(2).

Court against the Irrigation Districts. *Smith et al. v. Maricopa-Stanfield Irrigation & Drainage District, et al.*, No. CV 2001-00924.[6] The action sought to prevent the Irrigation Districts from relinquishing any of the CAP Subcontract water in which Smiths claimed appurtenant ownership interests.[7] Over two hundred landowners joined the Irrigation Districts in defending against Smiths in the State Case.

In December, 2003, Smiths moved for partial summary judgment. The Irrigation Districts and defendant landowners filed cross-motions for summary judgment. On November 16, 2004, the trial court entered its minute entry ruling granting summary judgment to Smiths. App. 14. The state trial court held that rights to Colorado River water under the CAP subcontracts were appurtenant to Smiths' land and that rights under each of the Agricultural CAP Subcontracts were contractually vested in the landowners and enforceable by them. The trial court also held that the landowners were intended third-party beneficiaries of the CAP Subcontracts and that an Irrigation District could not modify its Subcontract in any way that would affect a landowner's purported appurtenant rights without that landowner's consent.

[6] Plaintiffs in the State Case will also be collectively referred to herein as "Smiths".

[7] Of the 293,795 acre-feet of Agricultural CAP water potentially available to the Secretary for the Settlement, up to 180,000 acre-feet were to be relinquished by the Irrigation Districts. Settlement Agreement, subpara. 4.1.5, Table 5.1.4, App. 64-66, 68. If the two Irrigation Districts are not able to relinquish this water, the Secretary will not receive the 197,500 acre-feet required to implement the Settlement. (293,795 minus 180,000 equals less than 197,500.)

On December 14, 2004, the Irrigation Districts and 200 landowners filed a Petition for Special Action with the Arizona Supreme Court, urging the Court to take special action jurisdiction because of the state-wide importance of the case and to reverse the lower court's ruling. App. 21[8] On pages 1 through 5 of the Petition, the elements of the Settlement and their importance to Arizona are described.

The Arizona Department of Water Resources

The Department is the agency for the State of Arizona with general control and supervision of surface water, its appropriation and distribution. Ariz. Rev. Stat. Ann. § 45-103(B). The Director of the Department is charged with the duty of prosecuting and defending "all rights, claims and privileges of this state [the State of Arizona] respecting interstate streams," which includes the Colorado River. Ariz. Rev. Stat. Ann. § 45-105(A)(9).

The Director is also authorized, on behalf of the State of Arizona, to consult, advise and cooperate with the Secretary of the United States Department of the Interior ("Secretary") in the exercise of the Secretary's authority under the Boulder Canyon Project Act as well as the Secretary's authority to contract for the delivery of water from the main stream of the Colorado River for use within

[8] Briefs *amicus curiae* have been filed with the Arizona Supreme Court in support of the Petition for Special Action by the Arizona Department of Water Resources, CAWCD, the Gila River Indian Community, the Cities of Scottsdale, Mesa, Chandler, Glendale, and Goodyear, the Hohokam Irrigation & Drainage District and San Carlos Irrigation & Drainage District, and the Salt River Project.

the State of Arizona. Ariz. Rev. Stat. Ann. § 45-107(A)(1) and (2).

The Department has a strong interest in the trial court's ruling in the State Case and in the appellate result in the Federal Case for two reasons. If landowners are held to be intended beneficiaries of the Irrigation Districts' Agricultural CAP Subcontracts, with the power to prevent relinquishment of Subcontract water, the landmark Settlements Act cannot be implemented. The Agricultural CAP Subcontract water voluntary relinquished by agricultural CAP subcontractors (such as the Irrigation Districts) is to be used by the United States to settle current and future Indian water claims. If agricultural subcontractors fail to relinquish sufficient CAP water to enable the Secretary to make the required reallocations, the Settlement Act will fail.

The Settlement Act also allocates up to 96,295 acre-feet of relinquished water to the Director of the Department for future reallocation to Arizona non-Indian municipal and industrial water users. P.L. 108-451, § 104(a)(2). Consequently, the Department has a specific interest in ensuring that the Settlement Act is implemented.

Summary

The question presented in the *Orff* petition before this Court appears, on its face, to be the same question that was ruled on by the Arizona District Court in the Federal Case and by the trial court in the State Case. The underlying facts and law in the *Orff* matter are, however, significantly different from the facts and law in the Federal Case and the State Case. The *Orff* matter involves the San Luis Unit of Central Valley Project, a Reclamation project in

California on the San Joaquin River that is subject to Section 8 of the Reclamation Act. *Amici* express no view as to whether Section 8 confers on the *Orff* Petitioners the rights they assert, but even if it did, the Federal Case and State Case involve the Central Arizona Project, a Reclamation project in Arizona for the delivery of water from the Colorado River. The delivery of Colorado River water is **not** subject to Section 8 of the Reclamation Act.

Amici have a direct interest in ensuring that the differences between the *Orff* case and the Arizona cases in which they are parties are called to the attention of this Court so that the Court's decision is made with recognition of these differences. At stake for the *amici* and for the state of Arizona as a whole is the preservation and implementation of the Settlement twenty years in the making that was recently authorized by Congress and the President.

SUMMARY OF ARGUMENT

The *Orff* petition before this Court presents the question of whether farmers in an irrigation district[9] that is governed by California law and located in a Reclamation project[10] that is subject to Section 8 of the 1902 Reclamation Act (43 U.S.C. §§ 372, 383) are intended third-party beneficiaries of their irrigation district's water service and repayment contracts with the United States.

[9] Westlands Water District.

[10] The San Luis Unit of the Central Valley Project.

The Federal Case and the State Case in which these Arizona *amici* are involved present the questions of:

1) whether landowners in an Arizona irrigation district receiving Central Arizona Project water are owners of Colorado River water rights appurtenant to their land, and

2) whether they are intended third-party beneficiaries of the master repayment contract between CAWCD and the Secretary and the Subcontracts among CAWCD, the Irrigation Districts and the Secretary.

Petitioners describe the history and scope of the Reclamation program undertaken by the United States, through the Secretary and the Bureau of Reclamation ("Bureau") beginning in 1902. Petitioners' Brief on the Merits, at 4. Although the description is generally accurate, it does not take into account the often unique circumstances of the individual Reclamation projects in the program. For instance, Petitioners cite Section 8 of the 1902 Reclamation Act as support for their assertion that "(p)roperty rights are a key feature of the Reclamation program." *Id.* at 3. Section 8 provides that state laws shall govern the control, appropriation, use and distribution of water used in irrigation and that the "right to the use of water" acquired under state laws "shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." Reclamation Act of 1902, c. 1093, § 8, 32 Stat. 388, 43 U.S.C. §§ 372, 383. The general effect of Section 8 is that state water law governs the acquisition of water rights for Reclamation projects, but Section 8 does not apply to water rights in all Reclamation projects.

In particular, it does not apply to post-1928 rights in Colorado River water. Post-1928 Colorado River water is not allocated among the basin states, or between users within those states, based upon prior appropriation or other state law principles. Instead, the seven Colorado River Basin states allocated the river between the Upper and Lower Basins by interstate compact in 1922;[11] and Congress, in the 1928 Boulder Canyon Project Act, 45 Stat. 1057 ("1928 Act"), allocated rights to the river among the three Lower Basin states (California, Arizona, and Nevada) and granted the Secretary of the Interior expansive authority to allocate and contract for the delivery of Colorado River water to the various entities within the states.

After 1928, Colorado River water could be used only by contract with the Secretary, not under or pursuant to state water law. The decision of this Court in *Arizona v. California,* 373 U.S. 546 (1963), clearly confirmed that Section 8 is superseded by the body of law that governs the Colorado River, known collectively as "the Law of the River."

The Petitioners in *Orff* base their claim of intended beneficiary status on their ownership of water rights appurtenant to their land, pursuant to Section 8; the decision of the Federal Circuit Court in *H.F. Allen Orchards v. United States,* 749 F.2d 1571 (Fed. Cir. 1984); and other general federal Reclamation court decisions.[12]

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[11] Reprinted in Ariz. Rev. Stat. §§ 45-1302 to -1310; Boulder Canyon Project Act § 13(a), (45 Stat. 1057, 1064).

[12] *Amici* are not here agreeing with the *Orff* Petitioners that the ownership of appurtenant water rights is determinative of third party beneficiary status. That status is generally determined on the basis of

(Continued on following page)

The status of users of Colorado River water in the Central Arizona Project is, however, clearly not governed by Section 8 and these non-Colorado River cases. *Amici* request that this Court affirm the lower court's decision. If, however, the Court reverses that decision, we urge the Court to recognize in its opinion the fundamental and important differences between the Central Valley Project and the Central Arizona Project.

ARGUMENT

I. SECTION 8 OF THE 1902 RECLAMATION ACT DOES NOT APPLY TO COLORADO RIVER WATER DELIVERED THROUGH THE CENTRAL ARIZONA PROJECT.

A. The Law Of The River

1. The Colorado River Compact

The Colorado River is a navigable watercourse that flows through seven states and Mexico. *See Arizona v. California*, 373 U.S. 546, 552 (1963). Non-Indians in several areas along the Colorado first began diverting water from the river in the late 1800s. *See id.* The erratic nature of the river resulted in alternating periods of floods and droughts during this time. *Id.* at 553. The early farmers in southern California who had been diverting Colorado River water through the Alamo Canal, as well as a few early users in other states, desired to obtain federal

the clear intent of the parties as expressed in the contract. However, since the focus of Petitioners' argument is on Section 8 and asserted appurtenant water rights, *amici* primarily address those issues in this brief.

funding to build flood control and water storage and transmission facilities on the river. *Id.* At the same time, residents and potential users outside California were concerned that the "first in time, first in right" principles of prior appropriation water law might be applied to the river, so that the early California users would acquire a superior right to all or most of the water from the river. *Id.* These residents outside California were concerned that this problem would be further exacerbated if the Federal Government spent money to promote additional early use in California.[13]

To address these concerns, in 1922 representatives of the seven Colorado River Basin states met for several months to discuss an agreement to allocate water from the river. Unable to agree upon an allocation among the individual states, they settled on an allocation between the "Upper Basin" (the area above Lee Ferry in the Grand Canyon) and the "Lower Basin." This compromise is embodied in the 1922 Colorado River Compact. *See id.* at

[13] *See id.* at 555-56 ("The prospect that the United States would undertake to build a national project . . . brought to life strong fears in the northern basin States that additional waters made available by the storage and canal projects might be gobbled up in perpetuity by faster growing lower basin areas, particularly California. . . . These fears were not without foundation, since the law of prior appropriation prevailed in most of the Western States. . . . In 1922, . . . [the United States Supreme Court] held that the doctrine of prior appropriation could be given interstate effect. . . . Nevada, Utah, and especially Arizona were all [also] apprehensive that California's rapid declaration of appropriative claims would deprive them of their just share of basin water available after construction of the proposed United States project.") (citing *Wyoming v. Colorado*, 259 U.S. 419 (1922), *decree vacated*, 353 U.S. 953 (1957), which had applied prior appropriation in a dispute between two states, where both states applied prior appropriation in their internal water allocation).

557-58; *see also* Colorado River Compact, *reprinted in* Ariz. Rev. Stat. Ann. § 45-1311.

Although Arizona's representative signed the Compact, the Compact required that it be ratified by the respective legislatures of the signatory states. The Arizona Legislature refused to ratify the Compact, largely based upon continued concerns that the Lower Basin's share of the river had not been divided among Arizona, California, and Nevada and the possible implications of prior appropriation law on such a future division. *Arizona v. California*, 373 U.S. at 559-60.[14]

2. The 1928 Boulder Canyon Project Act

Congress eventually authorized construction of the proposed Boulder Canyon Project over Arizona's objection, passing the Boulder Canyon Project Act in 1928, 45 Stat. 1057, *codified at* 43 U.S.C. §§ 617-617t. The 1928 Act gave the Secretary of the Interior control over the allocation of Colorado River water among the individual states and among the various entities within those states. The Act also authorized the Secretary to enter into contracts with Arizona, California, and Nevada, with an allocation of Colorado River water as follows: Arizona – 2.8 million acre-feet ("MAF"); California – 4.4 MAF; and Nevada – 0.3 MAF. *See id.* § 617c. Arizona entered into a contract with

[14] "The concept of an allocation between basins quieted the fears of Upper Basin states that California would grab water to their detriment. But Arizona, lying largely in the Lower Basin, still feared that the neighboring Lower Basin state of California would get virtually all the water that new federal facilities would make available below Lee Ferry. Consequently, Arizona refused to ratify the compact." *Waters and Water Rights* § 47.01(b), at 671 (R. Beck, ed.) (1996).

the Secretary for its 2.8 MAF in 1944. *See* Contract for Delivery of Water ("Lake Mead Contract"), *reprinted in* Ariz. Rev. Stat. Ann. § 45-1301. Section 5 of the 1928 Act provided that state law for allocating water did not apply to post-1928 uses of Colorado River:

> The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses. . . . **No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.**

43 U.S.C. § 617d (emphasis added). Section 5 further stated that "[c]ontracts for the use of water . . . shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with the view of meeting the revenue requirements herein provided for." *Id.* § 617d(c).

3. *Arizona v. California*

The 1928 Act clearly established that Colorado River water is allocated exclusively by contract with the Secretary. Although this basic tenet of the Law of the River was set forth in 1928, this Court in *Arizona v. California* made it even more clear. The Court discussed the history of regulation and allocation of the Colorado River and upheld the Secretary's broad authority to allocate such water among the three Lower Basin states and between individual entities in the various states by entering into water delivery contracts with those entities. The Court stated

that, having authorized the use of federal money to build projects on the Colorado River in the 1928 Act, Congress clearly established that the Federal Government would control the use of water from those projects:

> Having undertaken this beneficial project, Congress, in several provisions of the [1928] Act, made it clear that no one should use mainstream [Colorado River] waters save in strict compliance with the scheme set up by the Act. Section 5 authorized the Secretary [of the Interior] "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river * * * as may be agreed upon, for irrigation and domestic uses * * *." To emphasize that water could be obtained from the Secretary alone, § 5 further declared, "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

373 U.S. at 579-80.

Basing its analysis on the express statements by Congress in the 1928 Act, the Court reiterated that contracts with the Secretary were the exclusive means to allocate legal rights to the waters of the Colorado River, both as among the states and among individual users within the states:

> These several provisions, even without legislative history, are persuasive that **Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water**. The general authority to make contracts normally includes the power to choose with whom and upon what terms the contract will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it. . . . Significantly, no phrase or provision indicating that the Secretary's contract power was to be controlled by the law of prior appropriation was substituted either then or at any time before passage of the Act, and we are persuaded that had Congress intended so to fetter the Secretary's direction, it would have done so in clear and unequivocal terms, as it did in recognizing "present perfected rights" [i.e., those rights acquired prior to passage of the 1928 Act] in § 6.

Id. at 580-81 (emphasis added).

In *Arizona v. California* this Court, after discussing the Reclamation Act and the 1928 Act, stated:

> . . . [W]e hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections [e.g., Section 8 of the Reclamation Act] to follow state law. . . . While the States were generally free to exercise some jurisdiction over these waters before the Act was passed, this right was subject to the Federal Government's right to regulate and develop the river. . . . [W]here the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, **state law has no place**.

Id. at 586-88 (emphasis added).

This Court recognized that federal Reclamation projects for the use of Colorado River water are inherently different from other projects and water rights, even those other projects constructed pursuant to the 1902 Reclamation Act. With respect to the interstate and international Colorado River, the Federal Government plays a more pervasive role in constructing and operating project facilities and promoting repayment of costs. The Court concluded its description of the broad authority of the Secretary to contractually allocate Colorado River waters as follows :

> All this vast, interlocking machinery – a dozen major works delivering water according to congressional fixed priorities for home, agricultural, and industrial uses to people spread over thousands of square miles – could function effectively only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, often conflicting interests of the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow. We are satisfied that the Secretary's power must be construed to permit him, within the boundaries set down in the Act, to allocate and distribute the waters of the mainstream of the Colorado River.

373 U.S. at 589-90.

4. The Colorado River Basin Project Act

The Secretary's exclusive power to allocate the waters of the mainstream of the Colorado River was reaffirmed in 1968 when Congress passed the Colorado River Basin Project Act ("1968 Act"), authorizing construction of the Central Arizona Project. *See* 43 U.S.C. §§ 1501 to 1556. The 1968 Act also provided for the Secretary to enter into "master contracts" for the repayment of CAP construction costs with a single political subdivision of the State of Arizona. *Id.* § 1524. The 1968 Act expressly stated that it "shall not be construed to alter, amend, repeal, modify, or be in conflict with" the 1922 Compact, this Court's 1963 *Arizona v. California* decision, or other portions of the Law of the River. 43 U.S.C. § 1551(a).

II. THE FACTS AND LAW APPLICABLE TO FARMERS IN THE CENTRAL VALLEY PROJECT ARE DIFFERENT FROM THOSE APPLICABLE TO FARMERS IN THE CENTRAL ARIZONA PROJECT.

A. Water Rights

1. The *Orff* Petitioners

The Petitioners in *Orff* claim their water rights under California law and the doctrine of prior appropriation as applied to federal Reclamation projects by Section 8 of the 1902 Federal Reclamation Act. Congress passed the Reclamation Act for the purpose of having the Federal Government play a more prominent role in the development of the West, particularly with respect to the development of water resources. *See Nevada v. United States*, 463 U.S. 110, 115, *reh'g denied*, 464 U.S. 875 (1983). At the same time, however, the states were concerned about

Federal interference in internal water matters. For that reason, Congress included Section 8 of the act, which provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. Therefore, for most federal Reclamation projects, all water rights must be acquired pursuant to state law. For those projects, individual users (or a water users' associations acting expressly on behalf of those individual users) follow state-mandated procedures in order to obtain appropriative rights to water, and those water rights are allocated on a "first in time, first in right" basis. In those situations, the fact that an individual owns land within the boundaries of a federal Reclamation project does not give that person a right to use water *unless* the water right acquisition procedures under state law have been satisfied.

According to Petitioners, the landowners in the San Joaquin Valley applied to the State of California to establish surface water rights on the basis of prior appropriation under California law. In order to proceed with the San Luis Unit of the Central Valley Project, the landowners assigned their state applications to the United States,

which proceeded to obtain water rights under state law. *See* Petitioners' Brief on the Merits, at 4-6. The contracts between the Westlands Water District and the United States contain provisions referring to the farmers' right to use the water and indicate a remedy for not receiving the water "of anyone claiming such right or remedy by or through the District." *Id.* at 20. Each of the contracts was made pursuant to the federal Reclamation law, including Section 8 of the 1902 Act. The *Orff* Petitioners cite four of this Court's decisions for the proposition that the farmers who apply the water in a Reclamation project to their land "equitably own, property rights in the water which are appurtenant to their lands. *Nevada v. United States*, 463 U.S. 110, 121-28 (1983); *California [v. United States*, 438 U.S. 645 (1978)] at 664, 653, 665, 667; *Nebraska v. Wyoming,* 325 U.S. 589, 611-16 (1945); *Ickes v. Fox*, 300 U.S. 82, 93-96 (1937)." Petitioners' Brief on the Merits, at 21. They also rely on *Allen Orchards,* in which the court stated: "it was undisputed that appellants [landowner/farmers] have a property right in the water to the extent of their beneficial use thereof." *Id.* at 26; *Allen Orchards,* 749 F.2d at 1576.

The *Orff* Petitioners summarize their position regarding ownership and appurtenance of the water rights as follows:

> The farmers equitably own the water rights which were perfected and are preserved by their use of the very water sold and delivered under the 1963 contract. They do not simply enjoy an indirect economic benefit as a result of its use. They hold a property right in its usage which is appurtenant to their lands.

Id.

2. Smiths in Arizona

The contrast between the *Orff* Petitioners and Smiths in the Arizona cases is striking. Smiths made no efforts to acquire appropriative rights in Colorado River water under Arizona law and no efforts to assign any such rights to the United States for the Central Arizona Project. Unlike the situation in the San Luis Unit of the Central Valley Project, the Secretary needed no state law water rights to establish and operate the CAP. Again, unlike the San Luis Unit, there was no need for a landowner to put the contract water to use in order to perfect and protect a state water right. And unlike the San Luis Unit, the provisions of Section 8 of the 1902 Act do not have any application to Colorado River water delivered through the Central Arizona Project. So the bases on which the *Orff* Petitioners claim appurtenant water rights simply do not exist with regard to the Central Arizona Project.

3. *California v. United States, Nevada v. United States, Nebraska v. Wyoming,* and *Ickes v. Fox*

The four Supreme Court cases Petitioners cite for their assertion of equitable ownership of appurtenant water rights all rely on Section 8 and do not involve Colorado River water.

a. *California v. United States*

In *California v. United States,* the dispute involved rights to the Stanislaus River under the Central Valley (California) Project. 438 U.S. at 645. The Bureau of Reclamation, on behalf of the Project landowners, applied for a permit to appropriate water from the California State

Water Resources Control Board. *Id.* at 652. Although the controversy in the case involved what conditions the State Board could impose on the Bureau's application, there was no disagreement that Section 8 of the Reclamation Act required the Bureau to apply for a state law prior appropriative right. *See id.*

Although one could argue that *California v. United States* overturned the general holding in *Arizona v. California* with respect to the 160-acre limitation by "disavow[ing] the dictum" from *Ivanhoe* and *City of Fresno,*[15] it cannot be said that the *California v. United States* Court overturned the *Arizona v. California* decision regarding the supremacy of Section 5 of the 1928 Act over Section 8 of the Reclamation Act with respect to Colorado River water delivery rights.

The *California v. United States* Court itself acknowledged the independent basis for the Court's holding in *Arizona v. California*:

> In *Arizona v. California*, the States had asked the Court to rule that state law would control in the distribution of water from the Boulder Canyon Project, a massive multistate Reclamation project on the Colorado River. After reviewing the legislative history of the Boulder Canyon Project Act, 43 U.S.C. § 617 *et seq.*, the Court concluded that because of the unique size and multistate scope of the Project, Congress did not intend the States to interfere with the Secretary's power to determine with whom and on what terms water contracts would be made.

[15] *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275 (1958); *City of Fresno v. California,* 372 U.S. 627 (1963).

> **While the Court in rejecting the States' claim repeated the language from *Ivanhoe* and *City of Fresno* as to the scope of § 8, there was no need for it to reaffirm such language except as it related to the singular legislative history of the Boulder Canyon Project Act.**

438 U.S. at 674 (emphasis added, citations omitted). Thus, the *California v. United States* Court acknowledged that, as to the allocation and use of Colorado River water, the specific provisions of Section 5 of the 1928 Act controlled over the general provisions in Section 8 of the Reclamation Act.

Courts since *California v. United States* have agreed that any criticism or limitation of *Arizona v. California* in that opinion related to the scope of Section 8 in a general sense and not to the interaction between Section 5 and Section 8. For example, in 1980, this Court was faced with the 160-acre limitation issue with respect to the Imperial Valley farmers in California. *Bryant v. Yellen*, 447 U.S. 352, *reh'g denied*, 448 U.S. 911 (1980). Noting the discussion of *Arizona v. California* in *California v. United States*, the *Bryant* court stated:

> In *Arizona v. California*, we held that the [1928 Act] vested in the Secretary the power to contract for project water deliveries independent of the direction of § 8 of the Reclamation Act to proceed in accordance with state law and of the admonition in § 18 of the [1928 Act] not to interfere with state law. . . . In terms of Reclamation law generally, the import of the Court's opinion in this respect was considerably narrowed in *California v. United States*, 438 U.S. 645, 98 S. Ct. 2985, 57 L.Ed.2d 1018 (1978), **but the latter case did not question the description of the Secretary's power under the [1928 Act] itself.**

447 U.S. at 370-71 & n.21 (emphasis added).

The Ninth Circuit came to the same conclusion in an appeal of a subsequent Arizona case. *Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284 (9th Cir. 1987). In that opinion, the court stated:

> Neither section 8 of the 1902 [Reclamation] Act nor the [1928 Act's] general statement of intent not to interfere with the states' rights to regulate water use within their borders, 43 U.S.C. § 617q, requires the Secretary to follow state law in allocating water among users within a particular state. *Arizona v. California*, 373 U.S. at 585-86, 83 S.Ct. at 1490. The Supreme Court in *California v. United States*, 438 U.S. at 674-75, 83 S.Ct. at 3000-01, disavowed dictum in *Arizona v. California*, 373 U.S. at 586-87, 83 S.Ct. at 1490-91, that 1902 [Reclamation] Act § 8 did not require the Secretary to comply with state law in distributing project water, even when that state law was not inconsistent with specific federal statutory requirements. However, the *California v. United States* decision "did not question the description of the Secretary's powers under [1928 Act] itself." *Bryant v. Yellen*, 447 U.S. 352, 370 n. 21, 100 S. Ct. 2232, 2242 n. 21, 65 L.Ed.2d 184 (1980).

820 F.2d at 287 n.4 (emphasis added).

The *Arizona v. California* decision that Section 5 of the 1928 Act supersedes Section 8 of the 1902 Reclamation Act with respect to Colorado River water remains the law. *California v. United States* did not address and does not

apply to Colorado River Water delivered through the Central Arizona Project.

b. *Ickes v. Fox, Nebraska v. Wyoming,* and *Nevada v. United States*

Ickes v. Fox established in 1937 that landowners in the Yakima Project who put Reclamation project water to beneficial use on their lands acquired an appurtenant water right under state law. The decision was based on Section 8 of the 1902 Reclamation Act. In 1945, this Court cited *Ickes* with approval in *Nebraska v. Wyoming* and again held that, pursuant to Section 8 of the 1902 Reclamation Act, individual landowners who appropriate Reclamation project water and put it to beneficial use acquire an appurtenant water right. Neither *Ickes* nor *Nebraska* was held in *Arizona v. California* in 1963 to be applicable to the Colorado River.

Again in *Nevada v. United States,* this Court cited *Ickes* and *Nebraska* in holding that landowners in the Newlands Reclamation Project held appurtenant beneficial interests in the water rights when the water was put by them to beneficial use on the land. Section 8 of the 1902 Reclamation Act clearly applied to the Newlands Reclamation Project. That project deals with the Truckee River and the Carson River. It does not involve any Colorado River water. The *Nevada* decision also has no application to the delivery of Colorado River water.

B. The *Allen Orchards* Case

The *Orff* Petitioners cite *Allen Orchards* as the seminal federal decision establishing the principle that ownership of the water rights in a Reclamation project gives the

landowners third-party beneficiary status under the project's water service and repayment contracts. In *Allen Orchards,* the Federal Circuit Court of Appeals, after holding that the plaintiff irrigators had failed to state a claim for relief, stated that the landowner farmers as "owners" of the water were "intended beneficiaries of the 1945 Consent Decree." 749 F.2d at 1576. The basis for this statement that the farmers were owners of the water was the decision in *Fox v. Ickes,* 137 F.2d 30 (D.C. Cir. 1943). There, the court held that irrigators in the Yakima Project in Washington owned a property right acquired by the beneficial use of water and went on to state that "the water-rights here are not based upon the construction or enforcement of contracts with the government." *Id.* at 35. The project in *Allen Orchards* was also the Yakima Project in Washington – a traditional Reclamation project of the type described on pages 1-4 of the Petitioner's Brief on the Merits where the provisions of Section 8 of the Reclamation Act apply.

The Reclamation project at issue in the Federal Case and the State Case, in which three of these *amici* are involved, is the Central Arizona Project. The CAP is not a traditional Reclamation project like the Yakima Project. Because of Section 5 of the 1928 Act, Section 8 does not apply to Colorado River water. The predicate used by the Federal Circuit in *Allen Orchards* for stating that irrigators are intended beneficiaries of Reclamation project contracts does not exist with regard to Central Arizona Project water.

C. Contractual Provisions

The *Orff* Petitioners cite a number of provisions in the contracts between the Bureau and the Westlands Water District to support their assertion of third-party beneficiary status. There are, however, significant differences between the Westlands contracts and the CAP Agricultural Subcontracts.

- The *Orff* Petitioners rely on Article 15 of the 1963 Westlands contract, which refers to the "right to any water" furnished thereunder possessed by any "tract of land or water user" in the district. Petitioners' Brief on the Merits, at 28. There is no such language in the CAP Agricultural Subcontracts. *See* Subcontract Subarticles 4.1, 4.3, 4.13, App. 164, 179.

- The *Orff* Petitioners also point to the reference in Article 9(c) of the Westlands contract to "those" claiming by, "through or under" the district. Petitioners' Brief on the Merits, at 30. There is no such reference in the CAP Agricultural Subcontracts. *See* Subcontract Subarticle 6.7, App. 189.

- The *Orff* Petitioners assert that references in the contracts to California law establish that the landowners equitably own appurtenant water rights under the California state law doctrine of prior appropriation and were, as a result, intended beneficiaries under the contracts. Petitioners' Brief on the Merits, at 35-36. In contrast, Smiths do not equitably own appurtenant water rights under the Arizona doctrine of prior appropriation. That doctrine does not apply to the Colorado River after 1928. Only through a contract with the United States can any right to use Colorado River water be established. Smiths have no such contract. Nor have they ever put any Colorado River water

received by the Irrigation Districts under their Subcontracts to any use. The only Colorado River water the Irrigation Districts have received has been "excess" CAP water made available under Excess Water Contracts at a low price, not higher-priced Subcontract water. *See* Exhibit A to CAIDD Statement of Facts, Affidavit of Paul Orme, ¶ 9, App. 205.

IV. CONCLUSION

In sum, the arguments presented in the *Orff* Petitioners' Brief on the Merits are, for the most part, predicated on their asserted ownership of appurtenant water rights under Section 8 of the 1902 Act which makes California law applicable. These arguments do not apply to landowners receiving Colorado River water pursuant to CAP subcontracts. Section 8 does not apply, nor does Arizona prior appropriation law. Whether the *Orff* Petitioners are or are not third-party beneficiaries of the Westlands contracts or the 1963 stipulated judgment, there can be no uniform rule that landowners in all federal Reclamation projects are always third-party beneficiaries of contracts between irrigation districts and the United States. A separate determination must be made in each case based on the facts and law applicable to each individual situation.

Amici respectfully request that this Court affirm the lower court's decision. If, however, this Court should decide to reverse the lower court's decision in the *Orff* case, *amici* request that the opinion specifically acknowledge that its conclusions do not apply to the Central

Arizona Project or to Reclamation projects in which the underlying facts and law differ from those present in *Orff*.

Respectfully submitted,

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January 6, 2005

No. 03-1566

In The
Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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APPENDIX TO *AMICI CURIAE* BRIEF OF CENTRAL ARIZONA WATER CONSERVATION DISTRICT, MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT AND ARIZONA DEPARTMENT OF WATER RESOURCES IN SUPPORT OF RESPONDENTS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John E. Smith and Mary Lou Smith, husband and wife; John E. Smith, as Trustee of the Smith Family Trust; Pretzer Land and Cattle Company, an Arizona corporation, Plaintiffs, vs. Central Arizona Water Conservation District, Defendant.	No. CIV 03-0505-PHX-EHC **ORDER** (Filed Sep. 12, 2003)

Pending before the Court are (1) Defendant's Motion to Dismiss [Dkt. 6]; (2) Plaintiffs' Petition to Abstain and Remand to State Court [Dkt. 10]; (3) Plaintiffs' Motion to Stay Motion to Dismiss [Dkt. 13]; (4) Plaintiffs' Motion for Two-Day Extension for Their Supplemental Memorandum in Support of Their Motion to Abstain and Remand and Their Supplemental Memorandum in Support of Their Response to Motion to Dismiss by Defendant [Dkt. 34].

I. Background

Plaintiffs John E. Smith, Mary Lou Smith, and the Smith Family Trust are landowners in Maricopa-Stanfield Irrigation and Drainage District ("MSIDD"). Plaintiff Pretzer Land and Cattle Company is a landowner in Central Arizona Irrigation and Drainage District ("CAIDD"). MSIDD and CAIDD are collectively referred to as the "Irrigation Districts."

The Arizona legislature created Defendant Central Arizona Water Conservation District ("CAWCD") in 1971. CAWCD was formed in relevant part to contract with the United States to finance reimbursement of construction and operation of Central Arizona Project ("CAP") to the federal government. In connection with that responsibility, CAWCD was authorized to subcontract with the Irrigation Districts who in turn could levy property taxes on landowners in their districts to subsidize its operating expenses and assist CAWCD in meeting its repayment obligations to the United States. *See* A.R.S. §§ 48-3701 *et seq.*

In 1968, Congress passed the Colorado River Basin Project Act ("Project Act.") The Project Act authorized construction of the CAP to store and deliver 2.8 million acre-feet of Colorado River water to Arizona and western New Mexico for irrigation as well as Municipal and Industrial ("M&I") use. *See* 43 U.S.C. §§ 1501, 1521.

On December 15, 1972, the United States and CAWCD entered into a contract. ("Master Contract"), under which the United States agreed to build CAP, and CAWCD agreed to repay its allocable costs.[1] On November 21, 1983, the Irrigation Districts executed subcontracts ("Subcontracts") with CAWCD and the United States. CAWCD agreed to deliver non-Indian Agriculture ("NIA") priority CAP water to the Irrigation Districts in return for payment of the Operation, Maintenance and Replacement

[1] The first action before this Court dealt with the repayment costs under the Master Contract. *Cent. Ariz. Water Conservation Dist. v. United States*, 32 F. Supp. 2d 117 (D. Ariz. 1998). ("Repayment litigation.")

costs ("OM &R") for the water delivered.[2] Plaintiffs thereafter executed a Memorandum of Understanding ("MOU") with the Irrigation District they were members of The United States and CAWCD were not parties to the MOU and never approved the MOU.

Under the MOU, signatory landowners agreed to execute agricultural water service contracts provided that "the right to receive Project Water . . . will form a part of the appurtenances to the Lands; such water is a direct benefit to the Lands and the covenants of Landowner to pay for said water and other obligations under the Contract shall run and bind said Land." [Plaintiffs' Response to Motion to Dismiss, Dkt. 11, p.8]. Each MOU also provided that each signatory landowner would grant immediate possession and convey to the irrigation districts the landowners' wells, pumping equipment, appurtenances, rights and privileges under the Arizona Groundwater Management Act.

By 1990, CAIDD and MSIDD were unable to pay the entire debt or pay full cost for CAP water. CAIDD filed bankruptcy, and MSIDD restructured its debt with its bondholders and the United States. In order to restructure the CAP repayment scheme, CAWCD entered into a letter agreement with Irrigation District subcontractors (including CAIDD and MSIDD) for the water years 1994-2003.

[2] CAWCD asserts that under the original Subcontracts MSIDD and CAIDD are obligated to pay the fixed OM&R costs for all CAP water to which the districts are entitled, whether the water is ordered or not. The Subcontracts also contained provisions regarding converting from agricultural to M&I water use and provided contingencies for the re-allotment of water should CAWCD be unable to deliver the Irrigation Districts contracted allotment.

Following the policy, the Irrigation District waived its rights to receive agricultural water pursuant to the Subcontract, and its right to convert (from agricultural) to M&I use. In exchange, CAWCD waived its right to receive fixed OM&R payments and penalties, and sold excess CAP water to the districts at essentially energy only cost[3] The practical result of the letter agreement was to make CAP water affordable to landowners within the districts.

The Repayment litigation was a complex dispute, between the United States and CAWCD over the repayment of the cost of constructing the CAP canal. The parties entered into a stipulation terminating the litigation upon the occurrence of a number of conditions.[4] One of the conditions is the relinquishment and the transfer of NIA CAP water to the Gila River Indian Community and to the Tohono O'odham Nation. The inducement for NIA districts (like CAIDD and MSIDD) to permanently relinquish their water rights under the Subcontract for some or all of the land in their district is 9(d) debt relief; Reclamation Reform Act exemption, and excess CAP water delivered to them by CAWCD at essentially energy only rates through the year 2030 (for the land which the Subcontract rights are relinquished). As to the land for which there is no relinquishment, the Subcontract rights and obligations would remain in effect.

[3] The United States was not a party to the letter agreements and challenged the validity of them in the Repayment litigation.

[4] Defendants and Interveners allege that if Plaintiffs are successful in preventing MSIDD from relinquishing the Subcontracts, the settlement package of the Repayment litigation will fail because one of the conditions of the settlement package (that 197,500 acre feet of CAP water be available to the United States to deliver to Indian tribes) will not be possible.

Plaintiffs filed suit in Pinal County Superior Court in March 2003 seeking declaratory relief under Arizona's Uniform Declaratory Judgments Act[5] *See* A.R.S. §§ 12-1831 *et seq.* Plaintiffs' claim relied upon alleged vested property rights to Reclamation water based on the Federal Reclamation Act of 1902, the Boulder Canyon Project Act, ("Boulder Canyon Project"), and all amendatory and supplementary Acts. *See. e.g,* 43 U.S.C. § 372 *et seq.,* 43 U.S.C. § 617 *et seq.* Defendant asserts this Court has original jurisdiction pursuant to 28 U.S.C. § 1331 and removed pursuant to 28 U.S.C. § 1441.

Plaintiffs contend a justiciable controversy exists because Plaintiffs have vested property rights in Arizona's Colorado River entitlement by reason of the CAP Subcontracts. Plaintiffs further assert CAWCD cannot interfere with Plaintiffs' rights to receive CAP water, and that CAWCD is obligated to deliver CAP water to MSIDD or CAIDD for the Plaintiffs' benefit. Plaintiffs allege they are third-party beneficiaries to the Subcontract and thus have standing. Defendant asserts Plaintiffs fail to state a claim upon which relief can be granted because there is neither a direct contractual relationship between Defendant and Plaintiffs, nor are Plaintiffs intended beneficiaries to either the Subcontracts or the Master Contract. Fed. R. Civ. Pro. 12(b)(6). Alternatively, Defendant moves to dismiss because Plaintiffs failed to join the United States, an indispensable party. Fed. R. Civ. Pro. I 2(b)(7), 19.

[5] In March of 2003 Plaintiffs filed a separate suit in Pinal County, Superior Court against CAIDD and MSIDD seeking to prevent the districts from relinquishing the Subcontracts, which they allege created legally and equitably vested appurtenant rights of Plaintiffs to receive NIA priority CAP water. The case is currently pending.

II. Analysis

Plaintiffs fail to cite any controlling authority for the proposition that the court should stay the Motion to Dismiss pending the resolution of the Motion to Abstain or Remand. Thus, the Court will address both the Motion to Dismiss and the Motion to Remand.

A. Remand

"An action filed in state court may be removed only if the district court could have exercised jurisdiction over the action if originally filed there," *Duncan v. Stuetzle,* 76 F.3d 1480, 1485 (9th Cir. 1996) (citing *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 2429 (1987)). "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Plaintiffs base their claims of vested property rights to Colorado River reclamation water on § 8 of the Reclamation Act of 1902[6] and support this claim with references to Congressional intent from the Boulder Canyon Project Act, 43 U.S.C. § 617 *et. seq.,* and the Colorado River Basin Project Act, 43 U.S.C. § 1501 *et seq.* The only question of state law Plaintiffs assert is their entitlement to a declaratory judgment of their rights under contracts to which they are not parties. The contracts in question (the Master Contract and the Subcontracts) are based on federal Reclamation law and the United States is a party to both contracts.

[6] "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372.

A declaration of Plaintiff's rights under these contracts involves interpretation of a contract "arising under" federal Reclamation law, and thus is a federal question.

Additionally, Plaintiffs argue this case should be remanded because "the legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California v. United States,* 438 U.S, 645, 675, 98 S.Ct. 2985, 3001 (1978). The legislative history of the Reclamation reiterates this sentiment but also contemplates that only the Federal government can build the "reservoirs and main line canals" necessary to reclaim the arid desert lands for settlement and that "the cost of constructions so far as possible (should) be repaid by the land reclaimed." *Id.* (citing HR., Doc, No. 1 (1901)). The federal government has not been fully repaid for the cost of construction of the CAP canal by the Irrigation Districts or the benefitted landowners. The subcontracts entered into by CAIDD and MSIDD attempt to repay the cost of construction, and Plaintiffs' suit undermines their efforts to do so. Nothing within the text of the Reclamation Act of 1902, subsequent Reclamation acts, or any Arizona or federal case law decisions supports the idea that Plaintiffs should be entitled to reclamation water without paying the cost of the project that made the water attainable. Because Plaintiffs seek a declaration of their rights under a contract to which the United States was a party, state law is not controlling. Plaintiffs fail to cite any exceptional circumstances that would make remand appropriate.

B. Abstention

In the alternative to remanding, Plaintiffs ask this Court to stay this action pending resolution of proceedings in state court. Plaintiffs argue "wise judicial administration . . . counsels that decision of the federal question be deferred until the potentially controlling state-law issue is authoritatively put to rest." *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135-36, 82 S.Ct 676, 677 (1962) (citing *Leitner Minerals Inc. v. United States,* 352 U.S. 220, 228-29, 77 S.Ct 287, 292 (1957)). *United Gas* involved the interpretation of an Alabama state License Code and the intent of the Alabama State legislature in enacting the Code. *Leitner* involved the interpretation of a Louisiana statute. As the present case involves neither interpretation of a state statute, nor a federal constitutional issue which can be deferred pending a state court decision, abstention under *United Gas* or *Leitner* is not warranted.

Plaintiffs also call for an abstention under the *Colorado River* doctrine, when "federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial policy concern." *Kern-Tulare Water Dist. v. City of Bakersfield,* 828 F.2d 514, 516 (9th Cir. 1987). "The circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited that the circumstances appropriate for abstention." *Colorado River Water Conservation Dist v. United States,* 424 U.S. 800, 818, 96 S.Ct. 1236, 1246 (1976). Plaintiffs urge an "inquiry into the scope of the pending state court proceeding" maybe necessary before a district court removes a case from state court.

Brillhardt v. Excess Ins. Co. of America, 316 U.S. 491, 495, 62 S.Ct. 1173, 1176 (1942). The proceedings in state court involve a contractual dispute between Plaintiffs and the respective irrigation districts, MSIDD or CAIDD, in which they are members. Plaintiffs filed separate lawsuits against the irrigations districts and CAWCD in Pinal County Superior Court.

In this case, Plaintiffs seek a declaration of their property rights under the Master Contact, based on federal Reclamation laws between the United States and CAWCD, and the Subcontracts, also based on federal Reclamation law, between the United States, CAWCD and either MSIDD or CAIDD. "Federal law governs the interpretation of contracts entered into pursuant to federal law where the government is a party." *O'Neill v. United States,* 50 F.3d 677, 682 (9th Cir. 1995) (citing *Kennewick Irrigation Dist. v. United States,* 880 F.2d 1018, 1032 (9th Cir. 1989)). "Federal courts have a 'virtually unflagging obligation' to exercise the jurisdiction conferred on them . . . a district could nonetheless abstain from the assumption of jurisdiction over a suit in 'exceptional' circumstances." *Wilton v. Seven Falls Co.,* 515 U.S. 277, 284 115 S.Ct 2137, 2141 (1995) (citing *Colorado River,* 424, U.S. at 813, 818-820, 96 S.Ct. 1236, 1246-1248 (1976)).[7]

[7] In *Wilton,* the Court stated several *circumstances* that would support a finding of exceptional circumstances, including "the absence of any proceedings in the District Court...and the prior participation of the Federal Government in related state proceedings." *Id.* at 284, 115 S.Ct at 2141. The interpretation of the Master Contract and Subcontracts, where CAWCD, the irrigation districts and the United States were parties or interveners, has already been the subject of a lengthy proceeding in this Court.

"Several factors must be considered in deciding whether the exceptional circumstances are present that make it proper to apply *Colorado River* abstention. These factors are: (1) which court first assumed jurisdiction over the property in dispute; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which jurisdiction was obtained." *American Intern. Underwriters (Philippines), Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1257 (9th Cir. 1988) (citing *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246-47), While the state court first assumed jurisdiction, the federal forum is not inconvenient because counsel for both Plaintiffs and Defendant reside in Maricopa county. Moreover, no danger of piecemeal litigation exists as Plaintiffs themselves filed two separate lawsuits. An abstention under *Colorado River* would be inappropriate.

C. Motion to Dismiss

CAWCD seeks dismissal of this action for failure to state a claim and failure to join an indispensable party. CAWCD argues Plaintiffs fail to state a claim for declaratory relief because they are neither parties nor third party beneficiaries to the federal contracts at issues. Alternatively, CAWCD seeks dismissal because Plaintiff's have failed to join the United States an indispensable party. Because this Court concludes Plaintiffs have failed to state a claim, it need not reach the alternative basis for dismissal.

Plaintiffs argue that under Arizona law they are entitled to seek a declaratory judgment, even if they are not parties to the contract in question, A.R.S. §§ 12-1831 *et seq.; See Foster v. Thunderbird Irrigation Water Delivery*

District of Pinal County, 125 Ariz. 324, 609 P.2d 594 (App. 1980), *Trico Electric Cooperative Inc. v. Ralson,* 67 Ariz. 358, 196 P.2d 470 (1948). "A plaintiff, however, in order to be entitled to relief; must have a legal, protectible interest . . . his pleading must present a state of facts showing he has a present legal right against the defendant" *Riley v. Cochise County,* 455 P.2d 1005, 1009 (Ariz. App. 1969). "When the defendant has no power to affect the plaintiff's right, no controversy is present." *Id.* at 1010. In *Foster,* the defendant was in violation of a specific statute regarding the installation of water meters, which the defendant had the ability to control. In *Trico,* the court held that users of water and electric energy supplied by a public utility may question the validity of a contract affecting such utility service under the Arizona Declaratory Judgment Act.[8] Here, Defendant is not disturbing the delivery of water; Plaintiffs are seeking a declaration of their vested property rights under a contact to which Defendant is merely a party. Defendant has no power to affect Plaintiffs' alleged rights.

In order to entitle Plaintiffs to a declaration of their rights under the Arizona Declaratory Judgment Act, A.R.S. §§ 12-1831 *et seq.,* a legal relationship in which Plaintiffs have a definite interest must exist. *Morris v. Fleming,* 625 P.2d 334, 336, 128 Ariz. 271, 273 (Ariz. App. 1980). Plaintiffs argue they are intended beneficiaries of the Master Contract and Subcontract because they have the equivalent interest of present perfected rights (PPR's)

[8] In *Trico,* Plaintiffs alleged, and the court agreed, that Defendant Trico Elec. Corp. had entered into an option agreement (which affected utility service) that was outside the powers conferred on the corporation by its charter.

to Colorado River water. "The Supreme Court has defined PPR's as those rights to water from the Colorado River system existing as of June 25, 1929." *Mohave Valley Irrigation & Drainage Dist. v. Norton,* 244 F.3d 1164, 1165 (9th Cir. 2001); *see also Arizona v. California* 373 U.S. 340, 341, 83 S.Ct. 755, 756 (1964). Plaintiffs proffer no argument as to why their rights are legally analogous to PPR's. The CAP canal, which enables water to be delivered to Plaintiffs, was not authorized until 1968.

"To sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 2001). "Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary." *Id.* (citing Restatement (Second) of Contracts § 313 (2)). "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." Restatement § 313 cmt. a. "An incidental beneficiary acquires . . . no right against the promisor or the promise." *Id.* § 315.

Plaintiffs have failed to show they are more than incidental beneficiaries of either the Master Contract or the Subcontracts.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion to Stay Defendant's Motion to Dismiss [Dkt. 13] is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Abstain and Remand [Dkt 10-1, 10-2] is **DENIED**.

IT IS FURTHER ORDERED that Defendant's motion to Dismiss [Dkt. 6] is **GRANTED**, and this action is hereby dismissed.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Two-Day Extension for Their Supplemental Memorandum in Support of Their Motion to Abstain and Remand and Their Supplemental Memorandum in Support of Their Response to Motion to Dismiss by Defendant [Dkt. 34] is **GRANTED**.

IT IS FURTHER ORDERED that the Motion of Marathon Farming Investments L.L.C. and Maricopa Stanfield Landowners Association Members to Intervene is **DENIED** as moot. [Dkt. 20].

IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendants and that Plaintiffs take nothing by this action.

DATED this 11th day of September, 2003,

/s/ Earl H. Carroll

Earl H. Carroll
United States District Judge

IN THE SUPERIOR COURT

PINAL COUNTY, STATE OF ARIZONA

DATE: 11/08/2004

Filed in Court
Record
Date Filed: 11/16/2004
Time Filed: 10:21 AM

HON KELLY MARIE ROBERTSON
Division: 3
Court Reporter: NONE

KRISTI YOUTSEY RUIZ, CLERK
By,
BARBARA J. NICLOY
Deputy Clerk.

JOHN E SMITH, et al.,
Plaintiff(s),
vs.
MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, et al.,
Defendant(s).

CV200100924
MINUTE ENTRY ACTION:
RULING ON MOTION(S)/ISSUE(S)

PRESENT:

The Court having considered the arguments and the motions of the parties as well as the differing views of the law clerks, does FIND for the plaintiffs on the requests made prior to oral argument in early August of 2004. The Court notes there are new pending matters and this finding does not address those concerns. While the issue is complex and plaintiffs' counsel will be allowed to submit proposed findings of facts and conclusions of law not inconsistent with this minute entry, the Court makes the

following simplified observations in holding for the plaintiff:

PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

The Plaintiffs move for Summary Judgment on two counts. Count One is a complaint for Special Action. The Plaintiff landowners ask the Superior Court of the State of Arizona (the Court) to issue an order prohibiting Maricopa-Stanfield Irrigation and Drainage District (MSIDD) and Central Arizona Irrigation and Drainage District (CAIDD) from entering into negotiations for a new contract with the Central Arizona Water Conservation District (CAWCD). Count Two is a request for Declaratory Judgment. The landowners also ask the Court to issue an order enforcing the existing contracts between the CAWCD, MSIDD and CAIDD, as well as the contracts between the individual landowners and MSIDD and CAIDD (the Districts).

STATEMENT OF FACTS

There are five contracts that relate to the parties of this case. First, the master contracts are repayment contracts between the United States and the CAWCD for the costs of diverting water through the Central Arizona Project (CAP) canals and its features. Second, in the subcontracts, CAWCD and the United States entered into individual contracts with various Arizona entities for the delivery of CAP water. The districts, MSIDD and CAIDD, were organized to deliver water, including CAP water, to individual landowners. Third, the Districts entered into memoranda of understanding (MOUs) with the individual landowners. Fourth, following the MOUs, the individual

landowners, including the plaintiffs, entered into service contracts with the Districts. Prior to the service contracts, the plaintiffs' lands were certified by the State of Arizona as land qualifying for Irrigation Grandfathered Rights. Finally, interim contracts were created on ten year terms when the Districts and the landowners realized the costs of the service contracts were too expensive.

FINDINGS AND AUTHORITIES

PLAINTIFFS ARE ENTITLED TO RELIEF, BECAUSE THEY ARE AFFECTED BY THE VALIDATED SUB-CONTRACTS

A. CAP Water is Acquired Under the Provisions of *The Reclamation Act of 1902*.

If CAP water is "water acquired under the provisions of this Act," then the right to CAP water runs appurtenant to the land. 43 U.S.C. § 8, The Court in *Arizona v. California*, 573 U.S. 546 (1963), interpreted the Boulder Canyon Project Act, which allocates 2.8 million acre-feet of Colorado River water to Arizona, as a supplement to the Reclamation Act. The Boulder Canyon Project Act authorizes the Secretary of the Interior to allocate and store Colorado River water subject to the provisions of the reclamation law. *Id.* at 584. The Boulder Canyon Project Act does not provide alternatives to the appurtenant rights at issue. 43 U.S.C. § 617. The Colorado River Basin Project Act followed in 1968. 43 U.S.C. § 1524(b)(1). This act authorized CAP construction, authorized the Secretary of the Interior to allocate water to central Arizona, and authorized subcontracts. *Id.* The preamble to the subcontracts refers to the Reclamation Act. Therefore,

the CAP water that reaches the plaintiffs is "water acquired under the provisions" of the Reclamation Act and the rights run appurtenant to the land.

B. *Application*

The service contracts, that are secondary to the subcontracts, were created between the districts and the plaintiffs. The contracts allow the districts to use water from the landowners' grandfathered groundwater and irrigation wells. The service contracts also specify that the landowners are entitled to receive CAP water as well as ground water. Because the CAP water is acquired under the provisions of the Reclamation Act and the plaintiffs entered into these service contracts, they are contractually vested with the right to convert one acre-foot of NIA CAP water for M & I purposes if the water is not required for irrigation. As stated above, the rights vested in the individual landowners are attached to the land. 43 U.S.C. § 8. If the districts enter into new subcontracts, modify the existing subcontracts, or relinquish the existing subcontracts, the Districts will infringe upon the plaintiffs' rights to convert CAP water for M & I purposes, as well as making the land unsuitable for commercial agriculture, thus decreasing the value of the land.

SINCE **CAP** WATER IS ATTACHED TO THE LAND, THEN **CAWCD, MSIDD,** AND **CAIDD** CANNOT CHANGE THE VESTED CONTRACTURAL RIGHTS OF THE PLAINTIFFS WITHOUT THEIR CONSENT.

C. *Arizona Law Applies to the Validation Proceedings and the Subcontracts.*

State law applies to the design, construction and completion of the Reclamation projects. The

Reclamation Act creates property rights in the landowners who receive the project water; therefore, because property law is vested in state courts, the water rights laws of the state apply. *California v. United States*, 438 U.S. 645, 677 (1978). The landowners made payments and complied with obligations of the service contracts, so they are vested with a right to perpetual use of the CAP water that is appurtenant to their land. *Ickes v. Fox*, 300 U.S. 82, 94 (1937). The United States Supreme Court in *Ickes* also found that state law applies. *Id.* The Supreme Court held that "the appropriations under *state law* were made to the individual landowners pursuant to the procedure which Congress provided in the Reclamation Act . . . [and] we are dealing here only with an allocation, through the States, of water rights among appropriators." *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1975).

a. *Arizona Declaratory Statutes are Liberally Construed*

"Under the declaratory judgment act a justiciable controversy exists if there is 'an assertion of a right, status or legal relation in which the plaintiff has a definite interest and a denial of it by the opposing party." *McMann v. City of Tucson*, 202 Ariz. 468, 474, 47 P.3d 672, 678 (2002). Arizona's Declaratory Judgment Act is to be liberally construed and administered. *Podol v. Jacobs*, 65 Ariz. 50, 54, 173 P.2d 758, 761 (1946). In *Trico Electric Cooperative, Inc. v. Ralston*, 67 Ariz. 358, 366, 196 P.2d 470, 474 (1948), the plaintiffs were granted the right to "question . . . the validity of the contract (to which they were not a party) affecting such utility service, determined by a declaration of the

rights, status and legal relations thereunder." The *Trico* case was determined by a declaration of rights under the subcontracts affecting the plaintiffs water service. *Id.*

b. *Plaintiffs are Third Party Beneficiaries to the Validated Subcontracts.*

Sole beneficiary status is not necessary for the plaintiff landowners to be determined third party beneficiaries. *Nahom v. Blue Cross & Blue Shield of Arizona, Inc.*, 180 Ariz. 548, 552, 885 P.2d 1113, 1117 (1994). The plaintiffs are the intended beneficiaries of the subcontracts between the Districts and CAWCD, because the subcontracts were created to provide means for distribution of CAP water to agricultural landowners, a class in which the plaintiffs fit. "Irrigation districts are organized for the direct private benefit of their landowners and taxpayers. As such, they [the landowners] are required to help pay for the irrigation system and are entitled to a proportionate share of the water for irrigation of their lands . . . . " *Post v. Wright*, 37 Ariz. 105, 117, 289 P. 979, 983 (1930). The court in *Estate of Jennifer A. Bell v. American Motorist Insurance Co.*, 181 Ariz. 124, 126, 888 P.2d 1311, 1313 (1995), determined that the plaintiffs' situations cannot be changed without their consent. The court in *Estate of Bell* looked to the Restatement (Second) of Contracts § 311 (1979) and ruled that two parties cannot modify the agreement at the expense of a third because the plaintiffs have materially changed their position and relied on the subcontracts. *Id.* The plaintiffs have materially changed their position by paying taxes

toward CAP's expenses as well as giving up their grandfathered water usage rights. Therefore, the plaintiffs are entitled to a declaration of rights under the subcontracts.

CONCLUSION

The rights vested in the plaintiffs run appurtenant to their land; therefore, the Districts have no authority to modify or create new contracts that will affect those rights without the plaintiffs' consent. The Court grants Summary Judgment in favor of the Plaintiffs.

Mailed/distributed copy: 11/17/2004

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IN THE SUPREME COURT OF
THE STATE OF ARIZONA

MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, an Arizona municipal corporation; CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, an Arizona municipal corporation; and approximately two hundred landowners, Petitioners, v. THE HONORABLE KELLY MARIE ROBERTSON, Judge of the Pinal County Superior Court, Respondent, and JOHN E. SMITH, et al., Respondents-Real Parties in Interest.	No. Pinal County Superior Court No. CV 2001-00924

PETITION FOR SPECIAL ACTION

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JURISDICTIONAL STATEMENT

This is a petition for special action arising out of a grant by the Pinal County Superior Court of a motion for partial summary judgment in a civil action. This Court has jurisdiction over this matter pursuant to Article 6, § 5(4) of the Arizona Constitution. The decision of Respondent Judge Robertson would enjoin two irrigation districts from relinquishing Central Arizona Project ("CAP") subcontract water without the consent of every landowner.[1] Unless the decision is overturned, it will not be possible to implement the important and historic water settlements embodied in the Arizona Water Settlements Act. That Act was passed by Congress on November 17, 2004, and signed by the President on December 10, 2004. [App. 1.]

The Arizona Water Settlements Act

The benefits to Arizona of these settlements include, among others:

[1] The two irrigation districts directly at issue in this special action are Petitioners Maricopa-Stanfield Irrigation & Drainage District ("MSIDD") and the Central Arizona Irrigation and Drainage District ("CAIDD"). MSIDD and CAIDD are referred to herein collectively as "the Districts."

- Settlement of claims of the Gila River Indian Community filed in the Gila Adjudication to more than two million acre-feet of water that have for more than twenty years been a cloud on the water rights of users in and residents of the Salt and Gila River valleys and on the groundwater use rights of the Districts [App. 1, Title II];[2]
- Settlement of claims of the Tohono O'odham Nation filed in 1976 in federal court, which sought to enjoin the pumping of groundwater in the entire Tucson area [App. 1, Title III];
- Settlement of a long-standing dispute over Arizona's obligation to repay costs of the construction of the CAP and a reduction of Arizona's obligations by $650 million [App. 1, Title I];
- Allocation to CAP Municipal and Industrial subcontractors of an additional 65,000 acre-feet of CAP water and extension of the term of their subcontracts from 50 years to 100 years [App. I, Title I];
- Decrease in the cost of CAP water for farmers in the Districts from $76 per acre-foot to $28 per acre-foot for a cumulative thirty-year benefit of over $80 million for each District [App. 14, ¶ 28];
- Forgiveness of approximately $130 million of District debt to the United States, and relief to the farmers from restrictive limitations on CAP water

[2] *See In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, Maricopa County Superior Court, Nos. W-1 through W-4 ("Gila Adjudication"). An acre-foot equals 325,851 gallons of water. The two million acre-feet claimed by the Gila River Indian Community is more than the entire normal flow of the Gila and Salt Rivers. [App. 53]

use under various federal statutes. [App. 14, ¶ 29; App. 2, Exhibit 7.2]

The settlement package embodied in the Arizona Water Settlements Act will be referred to herein as "the Settlement." The Settlement has been characterized by Senator John McCain as being "of vital importance to Arizona's productive future." [App. 4, at 1.] Senator Jon Kyl has stated that the Settlement "could ultimately be nearly as important to Arizona's future as was the authorization of the Central Arizona Project itself." [App. 5, at A18.] *See also* App. 6-8.

The Importance of Agricultural CAP Water to the Settlement

The cornerstone of the Settlement is the voluntary relinquishment by agricultural CAP subcontractors of subcontract allocations of CAP water that will be used by the United States to settle Indian water claims. Since completion of the CAP in 1993, none of the irrigation districts with CAP subcontracts has been able to purchase Agricultural subcontract water because it was prohibitively expensive. [App. 14, ¶¶ 16-18.]

The CAP is administered by a three-county entity known as the Central Arizona Water Conservation District ("CAWCD"). *See* A.R.S. §§ 48-3701 to -3783. CAWCD responded to the irrigation districts' inability to afford water at the subcontract rate by making excess CAP water available to the districts at affordable prices for ten years. [App. 14, ¶¶ 19-21.] In 2002, in order to obtain CAP water for the Secretary of the Interior ("Secretary") to implement the Settlement, CAWCD offered a package of benefits to each district in exchange for relinquishment of its subcontract water rights. [App. 14,

¶¶ 24-30.] Both of the Districts held elections to determine whether landowners favored relinquishing the Districts' rights to subcontract water in return for the various benefits that were offered. A majority of votes in both Districts favored the proposed relinquishment. [App. 14, ¶ 32; App. 17, ¶ 5.]

This CAWCD proposal and the program for implementation of the Settlement are contained in the Arizona Water Settlement Agreement ("Settlement Agreement")[3] among CAWCD, the Arizona Department of Water Resources, and the United States, acting through the Secretary. [App. 2.] The Arizona Water Settlements Act authorized and directed the Secretary to execute the Settlement Agreement on behalf of the United States. The Settlement Agreement provides for the Secretary to use 197,500 acre-feet of Agricultural Subcontract water for reallocation to the Gila River Indian Community, the Tohono O'odham Nation, and other Indian tribes in settlement of pending water rights claims. [App. 1, § 104(a)(1)(A); App. 2, ¶¶9.2, 13.2.] If Agricultural subcontractors do not relinquish sufficient CAP water to enable the Secretary to make such reallocations, the Settlement Agreement and all of the settlements embodied in the Arizona Water Settlements Act will fail. [App. 1, 2.]

The Civil Action in the Trial Court

The civil action which is the subject of this petition was filed in 2001 in the Final, County Superior Court by some dissident landowners (collectively, "Plaintiffs").

---

[3] The Arizona Water Settlement Agreement is defined in § 2(32) of the Arizona Water Settlements Act as the "Master Agreement."

Plaintiffs sought to prevent the Districts from relinquishing any of the CAP Subcontract water in which Plaintiffs claimed appurtenant ownership interests. [App. 10.] Of the 293,795 acre-feet of Agricultural CAP water potentially available to the Secretary for the Settlement, up to 180,000 acre-feet were to be relinquished by the Districts. [App. 2, ¶5.1.4.] If the two Districts are not able to relinquish this water, the Secretary will not receive the 197,500 acre-feet required to implement the settlement. [*Id.*]

In December, 2003, Plaintiffs moved for partial summary judgment. [App. 11.] The Districts and defendant landowners filed cross-motions for summary judgment. [App. 13, 15, 16.] After extensive briefing, the court heard argument on August 6, 2004. [App. 11-48.] On November 16, 2004, the trial court issued its minute entry ruling granting summary judgment to Plaintiffs. A copy of that minute entry is attached to this Petition as Exhibit A. The court held that the rights to Colorado River water under the CAP subcontracts are appurtenant to Plaintiffs' land and that rights under each of the CAP Subcontracts are contractually vested in the landowners and enforceable by them. The trial court also held that the landowners are intended third-party beneficiaries of the CAP subcontracts and that a District cannot modify the subcontract in any way that will affect a landowner's appurtenant rights without that landowner's consent.

This Petition for Special Action

Petitioners seek a special action in the Supreme Court of Arizona because the trial court's ruling is an urgent matter of state-wide importance and great public interest. There are no factual issues; an appeal would not provide

an adequate remedy; the trial court's ruling contradicts a ruling by the United States District Court for the District of Arizona in a case involving the same Subcontracts and some of the same parties; and final resolution in a prompt manner is required.

If the lower court's decision is not overturned soon, Arizona and CAWCD will not be able to implement and complete the Settlement before the time limits set in the Act. *See* Section I of the Argument, *infra*.

Petitioners seek relief in this Court rather than the Court of Appeals because of the urgent need for speedy and final resolution of this matter of state-wide importance. Petitioners recognize that the acceptance of special action jurisdiction is highly discretionary. In a number of cases involving matters of state-wide significance where an appeal would not provide adequate or speedy relief, this Court has accepted jurisdiction.

In *Bledsoe v. Goodfarb,* 170 Ariz. 256, 823 P.2d 1264 (1991), *appeal after remand,* 179 Ariz. 469, 880 P.2d 689 (1994), *review denied* (Sept. 20, 1994), this Court accepted special action jurisdiction to review a grant of partial summary judgment that concerned the doctrine protecting owners and operators of irrigation canals from liability because it raised issues of state-wide significance. The issues raised in the present case concerning the historic settlements embodied in the Act are at least as important as the protection of owners and operators of irrigation canals from liability.

In accepting special action jurisdiction in *Western Water Service Sys. v. Superior Court,* 120 Ariz. 90, 91, 584 P.2d 554, 555 (1978), to review a superior court grant of

partial summary judgment that declared a statutory triple damage provision unconstitutional, this Court stated:

> This Court has the power to issue writs of review pursuant to the Constitution, Article 6, § 5, subsec. 4. It will accept jurisdiction and grant relief by way of special action if the issues raised are of sufficient importance to justify the review requested. . . . Jurisdiction was accepted here because we concluded that the trial court's granting of a motion for partial summary judgment is without precedent or support in the law and cannot be justified.

Here, the trial court's granting of the motion for partial summary judgment was without precedent or support in law and cannot be justified. In addition, if the ruling is not promptly overturned, water settlements of historic importance to the State of Arizona will fail.

This Court, rather than the Court of Appeals, is the appropriate forum for the resolution of the issues raised by this Petition. The decision of Respondent Judge Robertson would enjoin the Districts from relinquishing their CAP subcontracts without the consent of every landowner in each District. A decision by Division Two of the Court of Appeals in a special action challenging Judge Robertson's ruling, although of precedential value, might not have binding effect in Division One. Many of the other irrigation districts that have already relinquished their CAP subcontracts as part of the Settlement are in Maricopa County, to-wit: Chandler Heights Citrus Irrigation District, Queen Creek Irrigation District, San Tan Irrigation District, and Tonopah Irrigation District [App. 2, ¶ 5.1.4.] Having learned of Judge Robertson's ruling in this litigation, a landowner in any of these districts could assert in

the Maricopa County Superior Court the same claims made by Plaintiffs here. On review of the decision in that case, Division One of the Court of Appeals would not be bound by the decision of Division Two.

Furthermore, this Court has previously recognized the need for direct interlocutory review to this Court in important water matters. In 1989, this Court adopted a Special Procedural Order for Interlocutory Appeals and Certifications from the Gila Adjudication. [App. 51.] In that order, the Court noted that "[e]arly appellate review may avoid wasteful trial court proceedings, may result in substantial savings of time or expense, or may for other reasons be in the interests of justice." *Id.* at 7. In 1991, the Court adopted a subsequent Special Procedural Order for Approval of Federal Water Rights Settlements, Including Those of Indian Tribes. [App. 52.] That order provides that decisions on approval of Indian water rights settlements are subject to immediate interlocutory review by this Court. *Id.* § D(7), at 8. Although those orders are not strictly applicable to this Petition because it does not arise directly from the Gila Adjudication, the considerations supporting those orders weigh heavily in favor of this Court accepting this Petition, particularly in light of the fact that the trial court ruling at issue in this Petition effectively obliterates water rights settlements for two major Indian tribes that took decades to achieve.

The Arizona Legislature has also recognized the importance of finality in matters involving CAP contracts. A.R.S. § 48-3734 provides that review of an action to validate a CAP contract shall be by special action directly to this Court. In essence, Plaintiffs' lawsuit was a preemption of the contract validation process established in A.R.S. § 48-3731 *et seq.* With the completion and

implementation of the Settlement at stake, it is of the utmost importance that the issues raised in this Petition be resolved speedily and finally.

STATEMENT OF THE ISSUES

The central issue in this case is whether irrigation districts must obtain the express individual consent of each landowner in the district to modify agreements that specify the terms by which the districts receive water from the Central Arizona Project. The resolution of that issue turns on two subsidiary issues: (1) whether individual landowners are intended third-party beneficiaries of the Subcontracts pursuant to which irrigation districts receive water from the Central Arizona Project; and (2) whether, by virtue of applicable water law, individual landowners have acquired vested rights, appurtenant to the land, to receive water pursuant to those Subcontracts.

SUMMARY OF ARGUMENT

The trial court rendered summary judgment that individual landowners within the Districts have legal and contractual rights to receive water from the CAP under a CAP Agricultural subcontract. The trial court ruled that the Districts cannot, without the express individual consent of each landowner, modify the terms of the subcontracts pursuant to which the Districts are entitled to receive CAP water.

The trial court's ruling that each landowner is an intended third-party beneficiary of subcontracts among the Districts, the Secretary, and CAWCD was barred by collateral estoppel and the absence of indispensable

parties. That ruling is also demonstrably incorrect as a matter of law. The trial court's ruling that the right to CAP water is vested in the landowners by operation of law rests on a fundamental misunderstanding as to the law that has governed the allocation of water from the Lower Colorado River for decades.

STATEMENT OF FACTS

The Parties

Two of the Petitioners in this matter, MSIDD and CAIDD, are irrigation districts in Pinal County. The remaining Petitioners consist of approximately two hundred landowners ("Landowners") within those Districts who were parties defendant in the trial court proceedings. The Landowners supported the positions taken by the Districts in the trial court. The Landowners are more specifically identified in Exhibit B.

The Respondents-Real Parties in Interest consist of landowners within the Districts who were plaintiffs in the trial court ("Plaintiffs").[4] The Respondents-Real Parties in Interest are more specifically identified in Exhibit C.

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[4] Soon after oral argument on the motions, each of the Plaintiffs with CAP-eligible land within CAIDD sold its land. [App. 49.E.] Thus, as of this time, there are no Plaintiffs who own land within CAIDD that is eligible to receive CAP irrigation water, regardless of the outcome of this dispute. In MSIDD, a number of the Plaintiffs have also sold their land but some Plaintiffs from that District still have standing to assert the claims that have been raised in this matter. [App. 50.]

Background

In 1972, CAWCD and the Secretary entered into a Master Repayment Contract for the delivery of Colorado River water through the CAP and for the repayment of the allocable costs of the Project. [App. 9, Exhibits 1, 2.] In 1983, pursuant to the Master Repayment Contract, the Districts each entered into a long-term subcontract regarding CAP water with the Secretary and CAWCD. [App. 9, Exhibits 3, 4.] The agreements that allocate the water to the Districts and that govern the terms of its purchase are generally referred to as the Subcontracts. The landowners within the Districts were not parties to the Subcontracts.

The central fact about the Subcontracts, which have a term until 2043, is that the farmers in the Districts have never been able to afford to buy water at the price set by those agreements. In 1994, CAP infrastructure and water costs caused CAIDD to file for municipal bankruptcy protection. [App. 14, ¶ 18.] Because Subcontract water has never been affordable, neither District has ever received a drop of CAP water pursuant to its Subcontract. [App. 14, ¶ 28; App. 29, at 2.]

The Subcontracts contain a formula for determining the price that the Districts must pay for CAP water delivered under the Subcontracts. [App. 9, Exhibits 3, 4.] In 1993, when construction of the CAP was completed, the Districts advised CAWCD that they could not afford to pay the price dictated by the contractual formula for the water. [App. 14, ¶¶ 16-18.] The Districts and CAWCD dealt with the problem by entering into ten-year letter agreements that allowed the Districts to purchase "excess" water at affordable rates. [App. 14, ¶¶ 19-23.] Those agreements have now expired.

The Settlement Agreement provides the opportunity for the Districts to relinquish the Subcontract rights that they have never been able to afford to exercise in return for substantial benefits. The Settlement Agreement contemplates that the United States will acquire the agricultural Subcontract allocation that MSIDD, CAIDD, and other irrigation districts have agreed to relinquish. [App. 2, ¶ 9.2.] The first 197,500 acre-feet of water available for reallocation will be reallocated as follows:

- 102,000 acre-feet to the Gila River Indian Community
- 28,200 acre-feet to the Tohono O'odham Nation
- 67,300 acre-feet to be retained by the Secretary to be reallocated in future Arizona Indian water settlements.

[*Id.*] The remaining 96,295 acre-feet of relinquished water will be allocated to the Arizona Department of Water Resources in trust for future reallocation to Arizona non-Indian municipal and industrial water users.

In return for agreeing to relinquish their Subcontract rights, the Districts would obtain a number of significant concessions and benefits, MSIDD would be relieved from approximately $70 million in debt related to the construction of its facilities. [App. 2, Exhibit 7.2.] CAIDD would be relieved from approximately $60 million of similar debt. [*Id.*; App. 14, ¶ 29.] Both Districts would enter into new agreements with CAWCD that would enable them to purchase low-cost excess CAP water until 2030. [App. 14, ¶ 27.] The present value of this reduction in the cost of CAP water is approximately $80 million for each District. Potential and pending claims against the Districts by Indian tribes for groundwater depletion would be resolved. [App. 14,

¶ 30.] The Districts would also be relieved of obligations under the Reclamation Reform Act. [App. 14, ¶ 30.]

The Subcontract rights that the Districts have agreed to relinquish are essential to the Settlement. The Settlement Agreement provides that the United States may terminate the Settlement if the water available for reallocation is less than 197,500 acre-feet. [App. 2, ¶ 13.2.] If the trial court's order stands and MSIDD and CAIDD cannot relinquish their allocations, the water available for reallocation will constitute less than the required 197,500 acre-feet. [App. 2, at table 5.1.4; *id.*, subparagraph 5.2.3.]

As they did in entering into the Subcontracts in 1983, both Districts held landowner elections regarding the proposed relinquishment of Agricultural CAP Subcontract allocations pursuant to A.R.S. §§ 48-2977 and -2978. [App. 14, ¶ 32; App. 17, ¶ 5.] The vote in both Districts showed that the owners of a majority of the land voting favored the relinquishment. [App. 14, ¶ 32; App. 17, ¶ 5.] The elected board of each District approved the proposed relinquishment agreements. [App. 14, ¶ 35; App. 17, ¶ 7.] This lawsuit had already been filed. The relinquishment agreements signed by both Districts were conditioned on the final outcome of this case. [App. 14, ¶ 26; App. 17, ¶ 7.]

A few landowners in each District opposed the Settlement. With the consent of the Secretary and CAWCD, both Districts gave landowners the option of acquiring by assignment an individual right to purchase water according to the terms of the Subcontracts. [App. 29, at 2.] This option required the assignee landowner to pay the full Subcontract price for the assigned Subcontract water. [*Id.*] Only one of the Plaintiffs in CAIDD made a request for such an assignment. That request was untimely. [*Id.*] Only

two landowners in MSIDD, neither of which is a Plaintiff, chose to accept the offer of an assignment. [*Id.*] To date, no Subcontract has as yet been executed by either putative assignee.

The Legal Proceedings

Approximately 41 of the dissident landowners brought the legal action in 2001 in Pinal County Superior Court. [App. 10.] Plaintiffs requested special-action and declaratory relief to prohibit the Districts from relinquishing the Districts' Subcontract rights. [*Id.*]. They argued that the proposed relinquishment of rights under the Subcontracts would infringe on their individual water rights. [*Id.*]

This case was initially stayed because of uncertainty as to whether the Gila River Indian Community water settlement would go forward. [App. 55.] The stay was lifted in early 2003. [App. 56.] At that time, the trial court ruled that the landowners within the Districts were indispensable parties to this action and ordered them joined. [App. 56.] Most were. The majority of the landowners who were joined took no active role in the action. About two hundred twenty landowners, most of whom are Petitioners here, took an active role, opposing the claims by Plaintiffs and supporting the position of the Districts. [App. 15, 26, 33, 35.]

Subsequently in March 2003, Plaintiffs sued CAWCD in state court. CAWCD removed the action to federal district court. [App. 29, Exhibit 1.] As in their case against the Districts, Plaintiffs alleged in the federal case that the proposed relinquishment of rights under the Subcontracts by the Districts would infringe on rights to that water which they enjoyed individually. [*Id.*] In November 2003,

Judge Earl Carroll dismissed Plaintiffs' action for failure to state a claim upon which relief could be granted. [*Id.*] Judge Carroll held that, because Plaintiffs were not parties to the Subcontracts and were not intended third-party beneficiaries of those agreements, they could not obtain relief against CAWCD concerning the proposed modification of the Subcontracts. [*Id.* at 4, 9-10.]

In late 2003, Plaintiffs filed a motion for partial summary judgment in the present case. [App. 11.] Shortly thereafter, the Districts and Landowners filed cross-motions for summary judgment. [App. 13, 15, 16.] After extensive briefing and oral argument, Judge Robertson granted Plaintiffs summary judgment on November 16, 2004. [Ex. A.] Judge Robertson held, contrary to long-established law relating to the Colorado River, that Plaintiffs had acquired vested rights to Subcontract water by operation of law. [*Id.*] In addition, contrary to what Judge Carroll had ruled, the trial court held that Plaintiffs were intended third-party beneficiaries of the Subcontracts and that their consent was required before those agreements could be modified. [*Id.*]

ARGUMENT

I. THIS COURT SHOULD ACCEPT JURISDICTION OF THIS SPECIAL ACTION – PETITIONERS DO NOT HAVE AN ADEQUATE REMEDY BY APPEAL.

This case involves issues of law that are of state-wide importance. The importance of these issues was fully explained in the Jurisdictional Statement and will not be repeated here. The inadequacy of the remedy by appeal

was not explained in the Jurisdictional Statement and is the subject of this portion of the Argument.

There is a serious risk that an appeal would not provide relief from the trial court's ruling in time to salvage the Settlement. The stakes are too high for that risk to be taken.

Petitioners cannot appeal until there is a final judgment in the trial court. That may be two to three months away. An appeal to Division Two of the Court of Appeals might consume an additional twelve to eighteen months. A petition for review by either party might mean that the appeal from the trial court's order would not be completed for over two and a half years.

At that point, this case might or might not be over. Both sides to this dispute appear to believe that this case is suitable for resolution by summary judgment. If an appellate court were to disagree and decide that a trial as to some issue is necessary, a complete resolution might be years away.

The Arizona Water Settlements Act establishes a firm deadline of December 31, 2007, for satisfaction of a number of prerequisites to implementation of the Settlement. [App. 1, § 207(c)(2).] If that deadline is not met, federal authorization for the Settlement will expire. The allotted time might appear to be ample. It will not be if the necessary steps are delayed by the appeal of this case. The prerequisites to completion of the Settlement are numerous, complicated, interrelated and fragile.

(1) The Arizona Legislature must pass legislation to establish certain programs for protecting groundwater under the Gila River Indian Reservation and under the

Tohono O'odham Reservation. [App. 1, § 207(c)(1)(I).] The Legislature must also enact legislation to implement a groundwater protection program in the Upper Gila River basin. [*Id.*]

The Legislature has many demands on its attention. It must establish priorities. The trial court in this case has declared that a necessary component of the Settlement – i.e., the relinquishment of the Districts' CAP Subcontracts – is illegal. As long as the cloud of the lower court's ruling remains, it could be difficult to get the Legislature to enact legislation to implement a settlement that a Pinal County Superior Court Judge has pronounced dead.

(2) After the Legislature passes the required legislation, whenever that might be, the final dismissal of several court cases pending in federal district court in Tucson must be ordered. [App. 1, § 302(b).] Those eases cannot be dismissed until notification to class members has been provided. The federal court in Tucson cannot proceed with class notification of the proposed dismissal of those actions while the trial court's ruling stands and the viability of the Settlement remains in question.

(3) The settlement of claims by the Gila River Indian Community and the Tohono O'odham Nation must be submitted to the Gila Adjudication Court and approved. [App. 1, § 207(c)(1)(G).] It is estimated that it may take as much as a year to obtain approval after the applications are filed. Unforeseen complications or disputes could delay the completion of that step even further. If application for approval of the settlements was made while the trial court's ruling remains in effect, the existence of that ruling would become an issue in the Adjudication proceeding and

inhibit the Adjudication Court's review of the two Indian water claims settlements.

(4) Each District must initiate and complete validation proceedings in Pinal County Superior Court, in which all interested parties will have an opportunity to challenge the legality of the agreements to relinquish water. *See generally* A.R.S. §§ 48-3731 to 48-3734. As long as Judge Robertson's ruling stands, such proceedings cannot be meaningfully conducted. Plaintiffs would presumably contend that the illegality of the proposed agreements is *res judicata* by virtue of Judge Robertson's ruling. The Districts therefore would not be able to address any other legal objections that interested parties might have until the issues raised in this case are resolved. In addition, pursuant to section 29.5.2 of the Gila River Indian Community's Water Rights Settlement Agreement, this specific case must be resolved in the Districts' favor before their obligations under the Settlement are enforceable. [App. 3, § 29.5.2.]

An appeal might result in a final ruling in 2006, 2007 or even later. That ruling might or might not fully resolve the controversy. Several complicated steps must be taken between the time this controversy is fully resolved and the end of 2007. Arizona cannot afford to run the risk that the Settlement will fail because of court delays.

An appeal would not provide the timely relief required here. Petitioners have no "equally plain, speedy and adequate remedy by appeal." ARPSA 1. *City of Phoenix v. Superior Court (Kleven Constr.)*, 184 Ariz. 435, 436, 909 P.2d 502, 503 (App. 1995), *corrected* (1996); *Green v. Superior Court,* 132 Ariz. 468, 470, 647 P.2d 166, 168 (1982).

II. THE TRIAL COURT ERRED IN RULING THAT THE PLAINTIFF LANDOWNERS WERE INTENDED BENEFICIARIES OF THE SUBCONTRACTS.

The trial court concluded on the basis of Arizona law that Plaintiffs were intended third-party beneficiaries of the Subcontracts. [Ex. A at 4.] The trial court further held that, because Plaintiffs were third-party beneficiaries, the Districts could not modify the Subcontracts without Plaintiffs' consent. [*Id.*] This decision was erroneous.

A. The Trial Court Should Not Have Reached the Merits of Plaintiffs' Third-Party Beneficiary Claim

For two reasons, the trial court should not have reached the merits of the third-party beneficiary issue. One reason is that Plaintiffs were collaterally estopped from making that argument. The second reason is that all of the parties to the Subcontracts were indispensable with regard to that claim. Two of the parties to the Subcontracts had not been joined.

1. Plaintiffs Are Collaterally Estopped From Making a Third-Party Beneficiary Claim.

Plaintiffs had previously sued CAWCD over the same issues that Plaintiffs raised in this case. Judge Carroll of the United States District Court held in September 2003 that Plaintiffs were not third-party beneficiaries of the Subcontracts and dismissed their complaint. [App. 29, Exhibit 1.]

Collateral estoppel or issue preclusion is applicable when (1) the issue or fact to be litigated was actually litigated in a previous suit; (2) final judgment was entered;

(3) the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it; and (4) the resolution of the issue was essential to the prior judgment. *State ex rel. Dept. of Economic Sec. v. Powers*, 184 Ariz. 235, 237, 908 P.2d 49, 51 (App. 1995). Judge Carroll's opinion itself establishes that all of these requirements were satisfied in this instance. [App. 29, Exhibit 1.]

Plaintiffs contended that collateral estoppel did not apply because they were appealing Judge Carroll's decision to the Ninth Circuit. The pendency of Plaintiffs' appeal, however, did not suspend the collateral estoppel effect of Judge Carroll's ruling. Federal law controls when the preclusive effects of a federal judgment are asserted in a state proceeding. *See* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4433, at 310 (1981). Under federal law, the pendency of an appeal does not suspend the issue-preclusion effect of a judgment. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 327 (9th Cir. 1988); *Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993).

Although the issue of collateral estoppel was briefed and argued, the trial court made no mention of it when issuing a ruling that was directly at odds with the prior ruling of the federal district court. [Ex. A at 4.]

2. Indispensable Parties Were Not Joined in the Trial Court.

All of the parties to the Subcontract were indispensable parties with regard to Plaintiffs' third-party beneficiary claim. Two of the three parties to each Subcontract – i.e., the United States and CAWCD – were not joined in the trial court.

A motion that raised this defect in parties was pending when the trial court granted summary judgment. That motion has still not been formally decided by the trial court. The court's decision to rule on the merits without addressing the defect in parties, however, constituted an implicit denial of the motion. The fact that there has been no formal ruling on this issue by the trial court does not preclude this Court from addressing the issue. The absence of indispensable parties may be raised for the first time on appeal. *Siler v. Superior Court*, 83 Ariz. 49, 54, 316 P.2d 296, 300 (1957).

Third-party beneficiary rights are contract rights. *See* 9 Corbin on Contracts § 779J (Interim ed. 2002). The trial court's conclusion that Plaintiffs are intended beneficiaries of the Subcontracts means that individual landowners can enforce the Subcontracts directly against the United States and CAWCD. *See* Restatement (Second) of Contracts § 304. It means that individual landowners can veto changes to the Subcontracts under certain circumstances. *Id.* § 311, comment g. By allowing a non-party to the Subcontract to prohibit contract modifications, the trial court effectively impeded the ability of all three contracting parties to modify their agreement by consent. The trial court's ruling therefore impaired the interests of the absentees. *See* Ariz. R. Civ. P. 19(a).

Because the trial court rendered a ruling that was contrary to the prior federal court ruling, the parties to the Subcontracts are now subject to inconsistent adjudications concerning the rights and obligations that arise under their agreements. That fact provides a separate basis for concluding that the United States and CAWCD are necessary parties. *Id.*

"[A] contracting party is the paradigm of an indispensable party." *Travelers Indemnity Co. v. Household Int'l, Inc.*, 775 F. Supp. 518, 527 (D. Conn. 1991). The trial court erred in deciding contractual rights and obligations when two of the three parties to the contracts at issue were not present to defend their interests.

B. Federal Law Establishes that Plaintiffs Are Not Intended Third-Party Beneficiaries.

Yet another problem with the trial court's ruling was that the trial court applied the wrong body of substantive law to the issue. The United States is a party to the Subcontracts. Federal law determines whether someone is a third-party beneficiary of a contract to which the United States is a party, *Klamath Water Users Protective Ass'n v. Patterson,* 204 F.3d 1206, 1210 (9th Cir. 1999), *cert. denied,* 531 U.S. 812 (2000); *see also Kennewick Irr. Dist. v. United States,* 880 F.2d 1018, 1032 (9th Cir. 1989) (federal law controls the interpretation of a contract entered into pursuant to federal law when United States is a party). The federal district court had properly applied federal law when it concluded that Plaintiffs were not intended beneficiaries of the Subcontracts. [App. 29, Exhibit 1.] The trial court, without addressing the choice-of-law issue, applied Arizona law to the third-party beneficiary analysis. [Ex. A at 4.]

Under the federal law that should have been applied, Plaintiffs were not third-party beneficiaries of the Subcontracts. Parties that benefit from a government contract are generally assumed to be incidental beneficiaries unless the contract evidences a clear intent to the contrary. *Klamath,* 204 F.3d at 1211 (holding that water users were not intended beneficiaries of a reclamation contract); *accord*

Orff v. United States, 358 F.3d 1137, 1145-47 (9th Cir.), *cert. granted,* 125 S. Ct. 309, 73 USLW 3228, 73 USLW 3235 (2004).[5]

The thirty-six-page Subcontracts between the Districts, the United States, and CAIDD are almost entirely silent about the landowners. Nothing in the Subcontracts expressly or implicitly indicates that the landowners within the Districts were to have intended-beneficiary status.

Plaintiffs argued that section 4.3(i) of the Subcontract, commonly known as the "conversion" provision, shows that landowners were intended to have enforceable rights. [App. 11; App. 20; App. 29, at 19-21; App. 47.] Agricultural CAP water is cheaper than municipal and industrial water and, by law, agricultural water can only be provided to eligible users. [*See* App. 9, Exhibit 3, § 4.3(i); App. 9, Exhibit 4, § 4.3(i).] Section 4.3(i) provides that if the use of particular land were to change from agricultural to municipal and industrial (e.g., subdivisions), that land would remain eligible to receive CAP water but a new agreement, with higher water rates and involving other parties, would be required. The conversion provision ensured that ineligible lands would not receive agricultural water and that

[5] Certiorari was granted in *Orff* to resolve an apparent conflict between *Orff* and the decision in *H. F. Allen Orchards v. United States,* 749 F.2d 1571 (Fed. Cir. 1984), *cert. denied,* 474 U.S. 818 (1985), which held that certain landowners were third-party beneficiaries of a water contract. *H. F. Allen* is distinguishable from the present case because it was agreed in *H.F. Allen* that the landowners owned the water rights governed by the contract. In any event, the test used in *Orff* to determine third-party beneficiary status accords with the Restatement view, as discussed hereafter, and it is unlikely that the Supreme Court will articulate a materially different test.

the Districts would not pay low agricultural rates to serve what were in fact municipal and industrial water users.

Section 4.3(i) never mentions landowners. The landowner is given no role in the conversion of water from agricultural to municipal and industrial purposes. The fact that landowners could, as a practical matter, trigger certain consequences under the Subcontracts by retiring their land from fanning does not mean that they had rights under those agreements. The conversion provision does not come close to reflecting a "clear intent" to "grant [the landowners] enforceable rights" as required by federal law. *Klamath,* 204 F.3d at 1211.

C. Even if Arizona Law Applied to the Issue, Plaintiffs Would Not Be Intended Third-Party Beneficiaries.

Incorrectly applying Arizona law, the trial court based its third-party beneficiary holding on two premises. One was that "the subcontracts were created to provide means for distribution of CAP water to agricultural landowners, a class in which the plaintiffs fit." [Ex. A at 4.] Although the purposes of the various parties to the Subcontract were more varied and complex than such a statement indicates, the statement was substantially correct.

The trial court then cited a decision by this Court that observed that

> irrigation districts are organized for the direct private benefit of their landowners and taxpayers. As such, they are required to help pay for the irrigation system and are entitled to a proportionate share of the water for irrigation of their

> lands, as also any profits accruing from the operation of the system.

Post v. Wright, 37 Ariz. 105, 117, 289 P. 979, 983 (1930), *quoted in* Ex. A at 4. Based on the overall purpose of the Subcontracts and the language from *Post v. Wright,* the trial court concluded that Plaintiffs were intended beneficiaries and that the agreements could not be modified without their consent.

Neither *Post v. Wright* nor any other Arizona decision has established such an impractical test for third-party beneficiary status. The statement in *Post v. Wright that* landowners are entitled to a proportionate share of water speaks to the relationship between an irrigation district and its landowners. That case did not say or imply that each individual landowner in an irrigation district has the right to veto modifications of contracts between the irrigation district and third parties.

Petitioners are not aware of any Arizona decisions that address the test for determining whether someone is a third-party beneficiary of a government contract. *Cf. Basurto v. Utah Construction & Mining Co.*, 15 Ariz.App. 35, 485 P.2d 859, 863 (App. 1971) (identifying general test for third-party beneficiary status). The Restatement view is that, although government contracts often benefit the public, individual members of the public are treated as incidental beneficiaries unless a different intention is manifested. *Restatement (Second) of Contracts* § 313, comment a; *see also id.,* illustration B. Only when such a contract manifests a clear intent to grant individual citizens enforceable rights can a citizen claim to be an intended third-party beneficiary. *See Berberich v. United States*, 5 Cl. Ct. 652, 656 (1984), *aff'd,* 770 F.2d 179 (Fed.

Cir. 1985); *Coburn v. City of Dyersburg,* 774 S.W.2d 610, 612 (Tenn. App. 1989).

The trial court's contrary holding would apparently give rise to a rule that, whenever a contract with a public entity is ultimately for the sake of the public entity's constituents, those constituents are intended beneficiaries. That rule would make the citizenry intended beneficiaries of most governmental contracts. That would mean that each citizen could sue to enforce such contracts and that, at least in some cases, each citizen could block any proposed changes to such contracts. *See Restatement (Second) of Contracts* §§ 304 and 311, comment g. The patent unworkability of such a rule explains why no court appears ever to have adopted it, except for the trial court in this case.

D. Summary

In a case involving the very same Plaintiffs and the very same issues, a federal court had already held that Plaintiffs were not intended beneficiaries of the Subcontracts. The trial court nonetheless revisited and accepted an argument that Plaintiffs were collaterally estopped from making. The trial court ignored the absence of indispensable parties. It applied the wrong substantive law. It then reached the wrong result pursuant to a rationale which, if generally applied, would significantly impair governmental operations. If the trial court's ruling stands, the parties to the Subcontracts will be subject to flatly contradictory and irreconcilable adjudications concerning the rights and obligations created by those agreements. That ruling should not stand.

III. THE TRIAL COURT ERRED IN FINDING THAT RIGHTS TO WATER UNDER THE DISTRICTS' CAP SUBCONTRACTS WERE APPURTENANT TO PLAINTIFFS' LAND AND THAT PLAINTIFFS HAD INDIVIDUALIZED RIGHTS IN THOSE SUBCONTRACTS.

As an alternate basis for granting summary judgment, the trial court found that Plaintiffs had acquired individual rights to Subcontract water by operation of law. The trial court held that the Districts' CAP Subcontracts were appurtenant to the land within the Districts and that Plaintiffs therefore had individualized rights to a pro rata portion of the Subcontract rights. [Ex. A at 1-3.] For these reasons, the trial court concluded that the Districts could not modify the Subcontracts without each landowner's consent [*Id.*]

The trial court applied the wrong law to this issue and reached an entirely incorrect result. The state law that governs the acquisition of water rights in connection with many Reclamation projects does not apply to post-1928 rights in projects involving water from the Lower Colorado River, including the CAP. Federal law controls the acquisition of such rights. Such rights can be acquired only through a contract with the Secretary. Plaintiffs have no such contract, and they have no individual rights to the water.

A. Post-1928 Rights to Water from Reclamation Projects on the Lower Colorado River Can Only Be Acquired by Contract.

Many Reclamation projects in the United States are governed by rules that were established in the 1902 Federal Reclamation Act, 43 U.S.C. § 383. Section 8 of that

Act, upon which the trial court incorrectly relied in its ruling, provides that the Reclamation Act is not to be construed as affecting or interfering with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation." 43 U.S.C. § 383, *cited in* Ex. A at 2. The acquisition of water rights in connection with many Reclamation projects is therefore governed by state law.

In 1928, however, Congress enacted legislation that provided a different rule for the Lower Colorado River. The Boulder Canyon Project Act of 1928 allocated rights to the Colorado River among the three Lower Basin states (California, Arizona, and Nevada). The same act gave the Secretary of the Interior exclusive control over allocating Lower Colorado River water among the individual states and among various entities within those states. Section 5 of the act made it clear that rights to water from Reclamation projects on the Colorado River could be acquired *only* pursuant to a contract with the Secretary:

> The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses. . . . *No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.*

43 U.S.C. § 617d (emphasis added)

The United States Supreme Court acknowledged that post-1928 rights to Lower Colorado River water could be acquired only by a contract with the Secretary in *Arizona v. California,* 373 U.S. 546 (1963). The Court discussed the

Secretary's broad authority to allocate Colorado River water between individual entities in the affected states by entering into water delivery contracts with those entities. The Court noted that Congress had intentionally maintained federal control over the allocation of such water:

> Having undertaken this beneficial project, Congress, in several provisions of the [1928] Act, made it clear that no one should use mainstream [Colorado River] waters save in strict compliance with the scheme set up by the Act. Section 5 authorized the Secretary [of the Interior] "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river * * * as may be agreed upon, for irrigation and domestic uses * * * ." To emphasize that water could be obtained from the Secretary alone, § 5 further declared, "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

373 U.S. at 579-80.

The Court went on to state that, based upon Congress' express statement in the 1928 Act, contracts with the Secretary were the exclusive means to allocate post-1928 legal rights to the waters of the Lower Colorado River:

> These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water. . . .

Id. at 580-81 (emphasis added). The Court also observed that if Congress had intended that the Secretary's power to allocate water contractually would be subject to state-law water rights, it would have said so. It did not.

> Significantly, no phrase or provision indicating that the Secretary's contract power was to be controlled by the law of prior appropriation was substituted either then or at any time before passage of the Act, and we are persuaded that had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms, as it did in recognizing "present perfected rights" [i.e., those rights acquired prior to passage of the 1928 Act] in § 6.

Id.

B. Section 8 of the 1902 Reclamation Act Does Not Apply to This Case.

The trial court's ruling in this case was expressly grounded on Section 8 of the 1902 Federal Reclamation Act, 43 U.S.C. § 383, which makes state law generally determinative of water rights in other Reclamation projects. [Ex. A at 2.] The court in *Arizona v. California,* however, held that Section 8 did not apply to post-1928 contracts with the Secretary for Lower Colorado River water:

> . . . [W]e hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections [e.g., Section 8 of the Reclamation Act] to follow state law. . . . While the States were generally free to exercise some jurisdiction over these waters before the Act was passed, this

> right was subject to the Federal Government's right to regulate and develop the river. . . . [W]here the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, *state law has no place.*

Id. at 586-88 (emphasis added).

In support of its conclusion, the trial court also cited *California v. United States*, 438 U.S. 645 (1987). [Ex. A at 3.] *California v. United States* did not involve Colorado River water or the distinct body of law that governs rights to water from that river. At issue were rights to the Stanislaus River under the Central Valley Project in California. 438 U.S. at 645. In that case, Section 8 of the 1902 Reclamation Act applied and the landowners were required to obtain an appropriative right under state law. *California v. United States* sheds no light on the acquisition of water rights under the distinct rules that apply to the Colorado River.

California v. United States arguably narrowed some of the other holdings in *Arizona v. California.* The court in *California v. United States* acknowledged, however, as to the allocation and use of Colorado River water, the specific provisions of Section 5 of the 1928 Act controlled over the general provisions in Section 8 of the 1902 Reclamation Act. *See* 438 U.S. at 674; *see also Bryant v. Yellen*, 447 U.S. 352, 370-71 & n.21, *reh'g denied*, 448 U.S. 911 (1980) (*California v. United States* did not question the description of the Secretary's powers under the 1928 Act); *Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284, 287 n.4 (9th Cir. 1987) (same).

C. Plaintiffs Have No Individual Rights to Subcontract Water.

The Subcontracts give the Districts specified rights to CAP water. Plaintiffs are not parties to those agreements. They have no contracts with the Secretary. They therefore have no individual rights to CAP water. 43 U.S.C. § 617d.

Even if the trial court had been correct in applying state law to this issue, its ruling would still have been erroneous. Arizona law provides that water users can acquire rights to surface water only pursuant to the doctrine of prior appropriation. *See* A.R.S. § 45-151; *see also Clough v. Wing*, 2 Ariz. 371, 17 P. 453 (1888); *San Carlos Apache Tribe v. Superior Court,* 193 Ariz. 195, 972 P.2d 179 (1999). Plaintiffs have never appropriated or received any Subcontract water. [App. 14, ¶ 37.] No landowners in either District have. [*Id.*] Because Subcontract water was priced too high for farmers to use, the Districts have obtained all the CAP water they have received by short-term excess water contracts. Plaintiffs would therefore have no individual rights to Subcontract water *even if* state law were applicable.

D. Summary

Federal law determines how rights to CAP water are acquired. That law provides that such rights can be acquired only by contract with the Secretary Plaintiffs have no such contract, and they have no rights to CAP water.

CONCLUSION

Only prompt relief by this Court can ensure that the trial court's erroneous rulings do not derail a major water settlement. Petitioners request that this Court grant special action relief directing the superior court to (1) vacate the grant of summary judgment to Plaintiffs; and (2) enter summary judgment that Plaintiffs are not intended third-party beneficiaries of the Subcontracts among the United States, CAWCD and the Districts, and that Plaintiffs have not acquired individual rights to receive water pursuant to those Subcontracts under the law that governs the acquisition of rights to water from the Lower Colorado River. Petitioners also request an award of their attorneys' fees pursuant to A.R.S. § 12-341.01(A).

December 14, 2004.

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Arizona Water Settlement Agreement

This Agreement is among the **United States of America**, acting through the Secretary of the Interior **(Secretary)** and the United States Bureau of Reclamation, Lower Colorado Regional Office; and the **State of Arizona**, acting through the Arizona Department of Water Resources **(ADWR)**; and the **Central Arizona Water Conservation District (CAWCD)**, a political subdivision of the State of Arizona.

1. Recitals of Authority

1.1 The United States, acting through the Department of the Interior, is entering into this agreement pursuant to the Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof and supplementary thereto, including, but not limited to the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057), as amended, the Reclamation Project Act of August 4, 1939 (53 Stat. 1187), as amended, the Colorado River Basin Project Act of September 30, 1968 (82 Stat. 885), as amended, all collectively referred to as the "Federal Reclamation Laws."

1.2 The State of Arizona, acting through the Arizona Department of Water Resources, is entering into this agreement pursuant to Arizona Revised Statutes, Title 45, Ch. 1.

1.3 The Central Arizona Water Conservation District is entering into this agreement pursuant to Arizona Revised Statutes, Title 48, Ch. 22.

2. Definitions

2.1 "1983 ROD" shall mean the record of decision published March 24, 1983, 48 Fed. Reg. 12446.

2.2 "Act" shall mean the Arizona Water Settlements Act of 2002, introduced in the United States Senate as S.2992 on September 24, 2002.

2.3 "CAIDD" shall mean the Central Arizona Irrigation and Drainage District, a political subdivision of the State of Arizona.

2.4 "CAP" shall mean the Central Arizona Project, as authorized and constructed pursuant to the Colorado River Basin Project Act of 1968. For purposes of this Agreement, CAP shall have the same meaning as described in the CAWCD Repayment Stipulation.

2.5 "CAP Repayment Stipulation" shall mean the Stipulation Regarding a Stay of Litigation, Resolution of Issues During the Stay and for Ultimate Judgment Upon Satisfaction of Conditions, filed pursuant to the order entered on May 9, 2000 in *Central Arizona Water Conservation District v. United States, et al.* No. CIV-95-625-TUC-WDB (EHC), No. CIV-95-1720-PHX-EHC (Consolidated Action), United States District Court for the District of Arizona, and any amendment or revision thereof.

2.6 "Currently Uncontracted M&I Priority water" shall mean 65,647 acre-feet of CAP municipal and industrial priority water that was allocated in the 1983 ROD but for which a long-term contract has not been entered.

2.7 "GRIC Settlement Agreement" shall mean the Gila River Indian Community Water Rights Settlement Agreement as defined in the Act.

2.8 "HIDD" shall mean the Hohokam Irrigation and Drainage District, a political subdivision of the State of Arizona.

2.9 "Hohokam Agreement" shall mean the Agreement Among the United States, the Central Arizona Water Conservation District, the Hohokam Irrigation and Drainage District, and the Arizona Cities of Chandler, Mesa, Phoenix and Scottsdale, dated December 21, 1993.

2.10 "Hohokam 9(d) Debt" shall mean that portion of the debt to the United States incurred by HIDD under section 9(d) of the Reclamation Project Act of 1939 that is payable by HIDD under section 4.2.2 of the Hohokam Agreement.

2.11 "MSIDD" shall mean the Maricopa-Stanfield Irrigation & Drainage District, a political subdivision of the State of Arizona.

2.12 "NIA Priority water" shall mean CAP water having a non-Indian agricultural priority as described in subparagraph 8.16 of the GRIC Settlement Agreement.

3. Purpose of this Agreement

3.1 This agreement memorializes the parties' intended approach to settle all current CAP allocation issues between the United States and the State of Arizona by agreeing to make certain quantities of NIA priority water available to the Secretary for allocation to Indian communities, and certain quantities available to ADWR to be held in trust for future allocation by the Secretary to non-Indian users within Arizona in a manner consistent with the Act.

3.2 This agreement also requires a reallocation of the Currently Uncontracted M&I Priority Water, and an allocation of and contract for mainstream Colorado River water under the Boulder Canyon Project Act of 1928 to the Mohave County Water Authority in exchange for the voluntary relinquishment by Mohave County Water Authority of certain contractual rights to NIA Priority water.

4. Quantification of NIA Priority water available for Contract.

4.1 The parties agree that, for the purpose of entering into long term contacts and subcontracts for CAP water under the Colorado River Basin Project Act of 1968 and the CAP Stipulation, the quantity of CAP water available for long-term contract or subcontract, and the quantity of NIA priority water available for long term contracts and subcontracts shall be calculated as follows:

4.1.1 The normal year supply of Colorado River water available for CAP is deemed to be 1,490,000 acre-feet per year for purposes of long-term contracting. This supply includes the CAP Project Water delivered in accordance with the Ak-Chin Indian Community Water Rights Settlement Act of 1984, Pub. L. 98-530 (the "Ak-Chin Act"), and the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. 100-512 (the "SRPMIC Act"). Nothing in this agreement shall preclude CAWCD from diverting more than 1,490,000 acre-feet of Colorado River water in any year, but such excess diversion shall

not be available for long-term contract or subcontract.

4.1.2 To determine the amount of CAP water available for long-term contract and subcontract, canal losses and other operational losses for the CAP system must be subtracted. For purposes of this agreement, such losses shall be deemed to be 75,000 acre-feet per year for a normal year supply.

4.1.3 The normal year supply of CAP water available for long-term contract or subcontract shall be 1,415,000 acre-feet (1,490,000 acre-feet diverted from the Colorado River less 75,000 acre-feet of system loss).

4.1.4 Of the 1,415,000 acre-feet available for long-term contract or subcontract, the Secretary allocated 309,828 acre-feet to Indian uses and 638,823 acre-feet to municipal and industrial ("M&I") uses in the 1983 ROD. That left 466,349 acre-feet available for use by non-Indian agriculture in a normal year (the "1983 NIA Supply").

4.1.5 The 1983 NIA Supply was subsequently reduced as follows:

4.1.5.1 Under the Ak-Chin Act, the Secretary acquired 50,000 acre-feet of Colorado River water from the Yuma-Mesa Division of the Gila Project. After deducting for CAP system losses (deemed to be 5%), this acquisition resulted in a decrease of 47,500 acre-feet in the amount of CAP water available for

use by non-Indian agriculture in a normal year.

4.1.5.2 Under the SRPMIC Act, the Secretary acquired 22,000 acre-feet of Colorado River water from the Wellton-Mohawk Irrigation District. After deducting for CAP system losses (deemed to be 5%), this acquisition resulted in a decrease of 20,900 acre-feet in the amount of CAP water available for use by non-Indian agriculture in a normal year.

4.1.5.3 Under the Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. 101-628, the Secretary acquired the CAP entitlement of Harquahala Valley Irrigation District and was authorized to convert that water from CAP non-Indian agricultural priority to CAP Indian priority. This acquisition resulted in a decrease of 33,251 acre-feet in the amount of CAP water available for use by non-Indian agriculture in a normal year.

4.1.5.4 Under the SRPMIC Act, the Roosevelt Water Conservation District ("RWCD") assigned 5,000 acre-feet of its CAP entitlement to certain Arizona cities. That assignment resulted in a corresponding decrease in the amount of CAP water available for use by non-Indian agriculture in a normal year.

4.1.5.5 Under an August 7, 1992 agreement among RWCD, the Secretary and the Gila River Indian Community ("GRIC"), RWCD relinquished the remainder of its CAP entitlement for the use and benefit of GRIC. That relinquishment resulted in a decrease of 18,600 acre-feet in the amount of CAP water available for use by non-Indian agriculture in a normal year.

4.1.5.6 Under the Hohokam Agreement, the CAP entitlement of HIDD and certain additional non-Indian agricultural water was subcontracted to the cities of Chandler, Mesa, Phoenix and Scottsdale. That action resulted in a decrease of 47,303 acre-feet in the amount of CAP water available for use by non-Indian agriculture in a normal year.

4.1.6 As a result of the reductions in the non-Indian agricultural water supply described in subparagraph 4.1.5, the remaining amount of CAP water available for use by non-Indian agriculture in a normal year is 293,795 acre-feet.

4.2 The parties agree that the maximum amount of NIA Priority water that may be available for reallocation under this agreement is 293,795 acre-feet.

5. Water Available for Reallocation.

5.1 Voluntary Relinquishments.

5.1.1 By January 1, 2003, CAWCD shall distribute voluntary relinquishment agreements in the form attached as Exhibit 5.1.1 to this agreement to Maricopa-Stanfield Irrigation & Drainage District, Central Arizona Irrigation and Drainage District, Chandler Heights Citrus Irrigation District, Queen Creek Irrigation District, San Tan Irrigation District, Tonopah Irrigation District and New Magma Irrigation and Drainage District (collectively, the Agricultural subcontractors).

5.1.2 Each Agricultural subcontractor will be given until May 1, 2003, to execute a voluntary relinquishment agreement. This date may be extended by mutual agreement of the parties to this agreement.

5.1.3 The voluntary relinquishment agreements shall become effective upon satisfaction of all conditions contained therein.

5.1.4 For purposes of this agreement, the total amount of NIA Priority water that may be relinquished by each Agricultural subcontractor is deemed to be as shown in table 5.1.4.

Table 5.1.4

Agricultural subcontractor	**NIA Priority water** (acre-feet)
Maricopa-Stanfield Irrigation & Drainage District	89,861
Central Arizona Irrigation and Drainage District	89,821
Chandler Heights Citrus Irrigation District	1,185
Queen Creek Irrigation District	19,078
San Tan Irrigation District	3,041
Tonopah Irrigation District	7,821
New Magma Irrigation and Drainage District	11,415

5.1.5 If any Agricultural subcontractor retains a portion of its entitlement to NIA Priority water as provided in paragraph 6, then the amount deemed to be relinquished by that Agricultural subcontractor shall be reduced in proportion to the percentage of entitlement retained. For example, if Maricopa-Stanfield Irrigation & Drainage District retained 10 percent of its current entitlement, then it would be deemed to have relinquished 80,875 acre-feet (89,861 minus 8,986).

5.1.6 Any water relinquished under a voluntary relinquishment agreement shall be available for reallocation in accordance with paragraph 9.

5.1.7 If any Agricultural subcontractor has not executed a voluntary relinquishment agreement by January 1, 2004, then either the Secretary or CAWCD may initiate legal action to effect the relinquishment of the subcontractor's entitlement. Any water relinquished pursuant to such legal action shall be available for reallocation in accordance with paragraph 9.

5.2 Uncontracted NIA Priority Water.

5.2.1 The provisions of this subparagraph 5.2 shall become effective upon enactment of the Act.

5.2.2 The Secretary shall publish a notice in the Federal Register in substantially the same form as Exhibit 5.2.2 modifying and terminating the applicable provisions of the Record of Decision published in the Federal Register on February 5, 1992 (57 Fed. Reg. 4470). Such notice shall state that it is published pursuant to the Act and is therefore a revocable action under the applicable provisions of the Act.

5.2.3 Following publication of the notice pursuant to subparagraph 5.2.2, 71,573 acre-feet of NIA Priority water shall be available for reallocation in accordance with paragraph 9. Such water is in addition to water available for reallocation under subparagraph 5.1.6.

6. Retention of NIA Priority Water by Agricultural Subcontractors

6.1 Any Agricultural subcontractor with an existing water service subcontract for NIA Priority water may elect to retain a portion of its

current entitlement to NIA Priority water. Such election must be made at the time the Agicultural subcontractor executes a voluntary relinquishment agreement. Table 6.1 identifies those Agricultural subcontractors that have an existing water service subcontract for NIA Priority water and the current entitlement for each.

Table 6.1

Agricultural subcontractor	Current Entitlement (percentage of available agricultural water)
Maricopa-Stanfield Irrigation & Drainage District	20.48%
Central Arizona Irrigation and Drainage District	18.01%
Chandler Heights Citrus Irrigation District	0.28%
Queen Creek Irrigation District	4.83%
San Tan Irrigation District	0.77%
Tonopah Irrigation District	1.98%

6.2 The retained entitlement shall be for a portion of the Agricultural subcontractor's percentage share of the available CAP agricultural water supply. For example, if MSIDD retained 10 percent of its current entitlement, then it would be entitled to 2.048% of the available CAP agricultural water supply.

6.3 CAWCD will charge the Agricultural subcontractor the same rate for delivery of the retained NIA Priority water as it charges other long-term CAP subcontractors.

6.4 CAWCD will require the Agricultural subcontractor to take delivery of all retained NIA Priority water under its subcontract before it may receive any other CAP water, whether for direct or in lieu use.

6.5 The Secretary and CAWCD shall require the Agricultural subcontractor to pay to CAWCD a 9(d) debt service charge equal to the proportionate share of the 9(d) debt discharged in accordance with paragraph 7. For example, if MSIDD retained 10 percent of its current entitlement, then it would be responsible for paying CAWCD 10 percent of each of the 9(d) debt payments shown in Exhibit 7.2 for MSIDD.

6.6 The Secretary and CAWCD shall amend the CAP water service subcontract of any Agricultural subcontractor that retains a portion of its current entitlement to NIA Priority water. The amended subcontract shall: (i) reflect the change in percentage entitlement to NIA Priority water; (ii) require the subcontractor to pay 9(d) debt service charges to CAWCD; (iii) provide that CAP water may be used only within the subcontractor's service area, which is delineated on a map filed with CAWCD and approved by CAWCD and the Secretary; (iv) provide that failure to make any payment when due, including any 9(d) debt service charge, shall cause the subcontract to terminate; and (v) provide that upon termination the NIA Priority water entitlement under the subcontract, calculated in accordance with paragraph 5.1.5, shall immediately transfer to the ADWR Trust water contract described in paragraph 9.3. The form of amended subcontract shall be as in Exhibit 6.6 to this agreement.

6.7 An Agricultural subcontractor that retains a portion of its current entitlement to NIA Priority water may assign all or part of its amended subcontract to an individual landowner within the Agricultural subcontractor's service area for use on CAP eligible acres owned by the individual landowner. The form of assignment shall be as in Exhibit 6.7 to this agreement.

6.7.1 CAWCD and the Secretary shall approve any such assignment that conforms to this agreement.

6.7.2 Upon validation of the assignee's subcontract, the Agricultural subcontractor shall have no further rights or obligations as to the portion of its CAP entitlement assigned to the landowner.

7. Discharge and Assumption of Debt Due under § 9(d) of the Reclamation Project Act of 1939 (43 U.S.C. § 485h).

7.1. Except as provided in subparagraph 7.3, this paragraph 7 shall become effective upon satisfaction of all conditions in subparagraph 13.3.

7.2. Exhibit 7.2 lists those Agricultural subcontractors eligible to participate in voluntary relinquishment agreements that have incurred debt to the United States under section 9(d) of the Reclamation Project Act of 1939 and identifies for each subcontractor the 9(d) debt payments remaining after payment of all installments due through December 31, 2003. Exhibit 7.2 also identifies the Hohokam 9(d) Debt.

7.3. Any Agricultural subcontractor that executes a voluntary relinquishment agreement as

provided in subparagraph 5.1 shall be relieved of its 9(d) debt in accordance with this paragraph and subparagraph 6.5, effective upon satisfaction of all conditions in the voluntary relinquishment agreement.

7.4. HIDD shall be entitled to relief from the Hohokam 9(d) Debt in accordance with this paragraph.

7.5. The United States shall declare all installment payments shown on Exhibit 7.2 for HIDD and for each Agricultural subcontractor that has executed a voluntary relinquishment agreement as provided in subparagraph 5.1 to be non-reimbursable and non-returnable to the United States, until an aggregate total of $73,561,337.00 has been declared non-reimbursable. Discharge of payments under this subparagraph shall not accelerate any remaining payments and shall not affect any obligation the Agricultural subcontractor or its assignee(s) may have to pay 9(d) debt service charges to CAWCD under its subcontract as amended pursuant to subparagraph 6.5.

7.6. After $73,561,337.00 of 9(d) debt has been discharged under paragraph 7.5, CAWCD shall pay to the United States all remaining installment payments shown on Exhibit 7.2 for HIDD and for each Agricultural subcontractor that executed a voluntary relinquishment agreement as provided in subparagraph 5.1. The installments assumed by CAWCD shall be due and payable to the United States in the same year that they would have been due absent this agreement.

7.7. The Secretary shall amend the 9(d) debt repayment contracts of HIDD and each Agricultural subcontractor that has executed a voluntary relinquishment agreement as provided in subparagraph 5.1 to conform to this paragraph.

8. Interim Provisions

8.1. Subject to Congressional authorization, the Secretary shall extend on an annual basis the 9(d) debt repayment schedule for any Agricultural subcontractor that has executed a voluntary relinquishment agreement as provided in paragraph 5.1. The effect of each annual extension shall be to postpone the due date of all remaining installment payments by one year. Such extensions shall commence with payments due in calendar year 2004 and shall continue until all conditions in subparagraph 13.3 have been satisfied or until this agreement is terminated, whichever comes first. No penalties, interest or other liability shall accrue as a result of any such extension.

8.1.1. When all conditions in subparagraph 13.3 have been satisfied, 9(d) debt repayment shall be in accordance with paragraph 7.

8.1.2. If this agreement is terminated, then each Agricultural subcontractor shall be responsible for repayment to the United States of its 9(d) debt in accordance with its repayment contract as modified by the extension(s) provided under subparagraph 8.1. This subparagraph shall survive termination of this agreement.

8.2. Beginning in 2004 and continuing until all conditions in subparagraph 13.3 have been satisfied or until this agreement is terminated, whichever comes first, CAWCD shall provide excess CAP water to HIDD and to any Agricultural subcontractor that has executed a voluntary relinquishment agreement as provided in paragraph 5.1 in accordance with the agricultural pool and pricing policy for 2004 to 2030 adopted by the CAWCD Board of Directors and the excess water contract attached as Exhibit 8.2 to this agreement.

8.2.1. When all conditions in subparagraph 13.3 have been satisfied, CAWCD shall provide water in accordance with the voluntary relinquishment agreement and excess water contract attached thereto.

8.2.2. If this agreement is terminated, then CAWCD shall be under no obligation to continue providing water in accordance with the agricultural pool and pricing policy for 2004 to 2030 adopted by the CAWCD Board of Directors.

9. Reallocation of NIA Priority Water

9.1. The provisions of this paragraph 9 shall become effective upon enactment of the Act.

9.2. Water Available to the Secretary for Indian Uses.

9.2.1. The first 197,500 acre-feet of NIA Priority water available under paragraph 5 for reallocation shall be reallocated by the Secretary as follows:

9.2.1.1. The Secretary shall reallocate 102,000 acre-feet to the Gila River Indian Community in accordance with the terms of the GRIC settlement.

9.2.1.2. The Secretary shall reallocate 28,200 acre-feet to the Tohono O'Odham Nation in accordance with the SAWRSA settlement.

9.2.1.3. The Secretary shall retain 67,300 acre-feet for reallocation to Arizona Indian tribes, subject to the following:

9.2.1.3.1. Such water may be reallocated to an Arizona Indian tribe only pursuant to an Indian water rights settlement for that tribe that has been approved by act of Congress;

9.2.1.3.2. Except as authorized by Congress, no water reallocated to an Arizona Indian tribe pursuant to this subparagraph may be leased, exchanged, forborne, or otherwise transferred in any way by the tribe for use directly or indirectly off the tribe's reservation.

9.3 Water Available to ADWR for Non-Indian M&I Uses.

9.3.1. After 197,500 acre-feet has been made available to the Secretary for reallocation under subparagraph 9.2, all remaining NIA Priority water available under paragraph 5

for reallocation shall be reallocated by the Secretary to ADWR to be held under a contract in trust for future use by non-Indian M&I water users.

9.3.2. If any NIA Priority water becomes available for reallocation as a result of the termination of a CAP subcontract amended as provided in subparagraph 6.6, the Secretary shall immediately amend the ADWR contract in trust to add the water from the terminated subcontract.

9.3.3. The ADWR contract in trust shall prohibit the direct use of water by ADWR.

9.3.4. The CAP water held by ADWR under its contract in trust ("Trust water") shall be reallocated to non-Indian M&I water users in accordance with ADWR policy and the following:

9.3.4.1. ADWR shall not make a recommendation to the Secretary for Trust water prior to January 1, 2010, but may thereafter recommend that any or all Trust water be reallocated to specified M&I water users. The Secretary shall act upon such recommendation in accordance with the Act.

9.3.4.2. ADWR shall make Trust water available for reallocation to non-Indian M&I water users within the State of Arizona at periodic intervals, starting in 2010. Only those M&I water users that meet the criteria established by ADWR shall be eligible to receive Trust water.

ADWR shall retain a sufficient amount of Trust water through 2030 to satisfy the rights of first refusal described in paragaphs 9.3.4.3 through 9.3.4.6.

9.3.4.3. Through 2020, M&I water providers serving the area shown on Exhibit 9.3.4.3 (the "CAIDD Area") that meet ADWR's eligibility criteria shall have a right of first refusal to 7.8% of the Trust water offered at each interval, up to an aggregate maximum of 7,500 acre-feet. Exhibit 9.3.4.3 shall be amended to exclude any lands for which NIA Priority water is being retained by CAIDD or its assignee(s) under an amended subcontract as provided in paragraph 6.

9.3.4.3.1. If, at the time ADWR makes Trust water available to non-Indian M&I water users, NIA Priority water is being retained by CAIDD or its assignee(s) under an amended subcontract as provided in paragraph 6, the retained water shall count against the aggregate maximum of 7,500 acre-feet for the CAIDD Area, but shall not count against the 7.8% right of first refusal unless the 7.8% plus the retained water would exceed 7,500 acre-feet.

9.3.4.3.2. If M&I water providers serving the CAIDD Area do not exercise their full right of first refusal, then the unexercised portion of that right shall carry forward to the next offering of Trust water.

9.3.4.4. Through 2020, M&I water providers serving the area shown on Exhibit 9.3.4.4 (the "MSIDD Area") that meet ADWR's eligibility criteria shall have a right of first refusal to 7.8% of the Trust water offered at each interval, up to an aggregate maximum of 7,500 acre-feet. Exhibit 9.3.4.4 shall be amended to exclude any lands for which NIA Priority water is being retained by MSIDD or its assignee(s) under an amended subcontract as provided in paragraph 6

9.3.4.4.1. If, at the time ADWR makes Trust water available to non-Indian M&I water users, NIA Priority water is being retained by MSIDD or its assignee(s) under an amended subcontract as provided in paragraph 6, the retained water shall count against the aggregate maximum of 7,500 acre-feet for the MSIDD Area, but shall not count against the 7.8% right of first refusal unless the 7.8% plus the retained water would exceed 7,500 acre-feet.

9.3.4.4.2. If M&I water providers serving the MSIDD Area do not exercise their full right of first refusal, then the unexercised portion of that right will carry forward to the next offering of Trust water.

9.3.4.5. From 2021 through 2030, the rights of first refusal described in paragraphs 9.3.4.3 and 9.3.4.4 shall be combined and shall be available to M&I water providers that are serving either the CAIDD Area or the MSIDD Area and that meet ADWR's eligibility criteria.

9.3.4.6. Beginning in 2030, if M&I water providers serving the CAIDD Area of MSIDD Area have not exercised their right of first refusal as to all of the Trust water available under paragraphs 9.3.4.3 through 9.3.4.5, then the Pinal County Water Augmentation Authority (PCWAA) shall have a right of second refusal as to the remainder of that water. PCWAAA must meet the criteria established by ADWR to be eligible to receive Trust water.

9.3.4.7. The rights of refusal described in paragraphs 9.3.4.3 through 9.3.4.6 do not limit the amount of Trust water that may be reassigned to M&I water providers in Pinal County. If M&I water providers in Pinal County request additional Trust water over and above the

amount available to them under their right of first or second refusal, ADWR shall consider their request for additional water on the same basis as requests for Trust water from M&I water providers serving other areas.

9.4. All NIA Priority water reallocated under this paragraph shall retain its NIA priority.

9.5. All reallocations made under subparagraphs 9.2 and 9.3 and all contracts for NIA Priority water reallocated under subparagraphs 9.2 and 9.3 shall be contingent on satisfaction of all conditions in subparagraph 13.3 and all conditions in the voluntary relinquishment agreements by the dates specified therein.

10. Reallocation of Currently Uncontracted M&I Priority Water.

10.1. The provisions of this paragraph 10 shall become effective upon enactment of the Act.

10.2. The Secretary shall allocate the Currently Uncontracted M&I Priority water as shown in Table 10.2.

Table 10.2

Applicant	Amount (acre feet)	Applicant	Amount (acre feet)
Town of Superior	285	AVRA Cooperative	808
Cave Creek Water Company	806	City of Chandler	4,986
Chaparral Water Company	1,931	Del Lago (Vail) Water Company	1,071

Town of El Mirage	508	City of Glendale	3,053
City of Goodyear	7,211	Community Water Company of Green Valley	1,521
H2O Water Company	147	Metropolitan Domestic Water Improvement District	4,602
City of Mesa	7,115	Town of Oro Valley	3,557
City of Peoria	5,527	City of Phoenix	8,206
City of Scottsdale	2,981	City of Surprise	2,876
Tucson Water	8,206	Valley Utilities Water Company	250
TOTAL			**65,647**

10.3. The Secretary and CAWCD shall offer M&I subcontracts to the above listed providers reflecting the amount of water in this reallocation in addition to any water already under contract to that provider. The new subcontract or amendment to existing subcontract shall conform to the requirements of subsections 104(d)(1) and (2) of the Act.

10.4. All contracts for Currently Uncontracted M&I Priority water allocated under this paragraph 10 shall be contingent on satisfaction of all conditions in subparagraph 13.3 by the date specified therein.

11. Allocation of Mainstream Colorado River Water

11.1. This paragraph 11 shall become effective upon execution of this agreement and shall survive termination of this agreement.

11.2. Upon execution of this agreement, the Secretary shall, in cooperation with the Mohave County Water Authority, amend Bureau of Reclamation Contract No. 5-07-30-W0320, dated December 12, 1995, to accomplish the following: (i) allocate and contract to Mohave County Water Authority 3,500 acre-feet of Arizona fourth priority mainstream Colorado River water; (ii) delete the allocation and contract of 3,500 acre-feet of Arizona fifth and sixth priority mainstream Colorado River water; and (iii) delete the reference to allocation of future NIA Priority water to Mohave County Water Authority.

11.3. The Secretary shall reserve 3,500 acre-feet of currently uncontracted Arizona fourth priority mainstream Colorado River water for use in a future Navajo-Hopi Indian water rights settlement. The water reserved under this subparagraph shall not be allocated, nor shall any contract be issued under the Boulder Canyon Project Act for the use of this water, until a final Indian water rights settlement for the Navajo Nation has been approved by Congress, finalizing Navajo claims to the mainstream of the Colorado River within Arizona.

12. Miscellaneous Provisions

12.1. MSIDD and CAIDD are express third party beneficiaries as to the rights of first refusal set forth in subparagraphs 9.3.4.3 through 9.3.4.6.

12.2. Nothing in this agreement is intended to affect any party's obligations under applicable law.

12.3. No party shall take any action that is inconsistent with the party's ability to perform its obligations under this agreement, including obligations that arise upon passage of the Act and fulfillment of the conditions of subparagraph 13.3 and the voluntary relinquishment agreements.

12.4. Nothing in this agreement may be used against either CAWCD or the United States in *Central Arizona Water Conservation District v. United States,* Nos. CIV 95-625-TUC-WDB (EHC) and CIV 95-1720-PHX-EHC (Consolidated Action). This subparagraph shall survive termination of this agreement.

13. Effectiveness and Termination

13.1. Except as expressly provided in paragraphs 5.2, 7, 9 and 10, this agreement is effective upon execution by the parties.

13.2. The United States may terminate this agreement if the total amount of water available for reallocation under paragraph 9 upon enactment of the Act is less than 197,500 acre-feet.

13.3. This agreement shall terminate if all of the following conditions have not been satisfied by December 31, 2007:

13.3.1. The Gila River Indian Community water rights settlement agreement has been executed by the parties thereto and has been authorized, ratified and confirmed by Congress.

13.3.2. This agreement has been authorized, ratified and confirmed by Congress.

13.3.3. Congress has passed legislation declaring the $73,561,337 in 9(d) debt identified in subparagraph 7.5 to be non-reimbursable and non-returnable to the United States.

13.3.4. Congress has passed legislation declaring land within the exterior boundaries of CAWCD or served by CAP water to be exempt from the Reclamation Reform Act and any other acreage limitation or full cost pricing provision of federal law.

13.3.5. Final judgment has been entered by the United States District Court for the District of Arizona in *Central Arizona Water Conservation District v. United States, et al.,* No. CIV-95-625-TUC-WDB (EHC), No. CIV-95-1720-PHX-EHC (Consolidated Action), in accordance with the CAP Repayment Stipulation.

13.3.6. Any other action or event as to which the Secretary is to publish a statement of findings under section 207(d) of the Act has occurred.

13.4. Except as expressly provided in paragraph 11 and subparagraphs 8.1 2 and 12.4, no provision of this agreement shall survive termination.

13.5. If the date by which the Secretary is required to publish a statement of findings under section 207(d) of the Act is amended by subsequent act of Congress, then the deadline for

satisfying the conditions in paragraph 13.3 will automatically be amended to conform.

UNITED STATES OF AMERICA

By: _____

Secretary of the Interior

CENTRAL ARIZONA WATER CONSERVATION DISTRICT

Attest: [Illegible] _____ By: /s/ George Renner _____
Secretary President

ARIZONA DEPARTMENT OF WATER RESOURCES

By: /s/ Joseph C. Smith _____
Director

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[RELEVANT EXCERPTS]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINAL

JOHN E. SMITH and MARY LOU SMITH, husband and wife; JOHN E. SMITH, as Trustee of the SMITH FAMILY TRUST; and PRETZER LAND AND CATTLE COMPANY, an Arizona corporation,

Plaintiffs,

v.

No. CV 2001-00924

JOINT STATEMENT OF FACTS

(Assigned to the Honorable Kelly Marie Robertson, Div. 5)

MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, an Arizona municipal corporation, and CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, and Arizona municipal corporation, political subdivisions of the State of Arizona,

Defendants.

The parties submit this agreed-to **JOINT STATEMENT OF FACTS** in an effort to clarify and limit factual and legal issues before the Court. This Statement of Facts is not intended to be comprehensive, and the parties do not waive their right to allege and prove additional facts or argue additional law not contained herein.

1. Plaintiffs are farmers who own land in Pinal County, Arizona. Plaintiffs John and Mary Lou Smith and the Smith Family Trust own land within the boundaries of Defendant Maricopa-Stanfield Irrigation & Drainage District ("MSIDD"), and Plaintiff Pretzer Land and Cattle Company owns land within the boundaries of Defendant Central Arizona Irrigation and Drainage District ("CAIDD"). MSIDD and CAIDD are also referred to herein collectively as "the Districts."

* * *

9. On December 5, 1972, Contract No. 14-06-W-245 was entered into between the United States and CAWCD for delivery of water and repayment of costs of the CAP (hereafter "1972 Master Contract"). On December 1, 1988, the Master Contract was amended (hereinafter "1988 Master Contract"). Upon judicial confirmation of the

December 1, 1988 Amendment, the 1972 Master Contract was to be superseded and replaced by the 1988 Master Contract. A true and correct copy of the 1972 Master Contract is attached hereto as Exhibit 1, and a true and correct copy of the 1988 Master Contract is attached as Exhibit 2.

* * *

17. Paragraph 8.8(b)(vi) of the 1972 Master Contract and of the 1988 Master Contract, further provided, in part, that the Secretary and the Contractor shall require in each subcontract that " . . . irrigation water made available thereunder may be made available by the Secretary for M&I purposes if and to the extent that such water is no longer required by the Subcontractor for irrigation purposes and shall be made available in all cases where lands receiving project water have been converted to municipal or industrial use; *Provided however*, That Subcontracts effectuating such transfers are subject to the approval of the Secretary and the Contractor, which approval shall not be withheld "unreasonably."

18. On November 21, 1983, each defendant irrigation district, as contemplated by the 1972 Master Contract, entered into a subcontract with the United States and the CAWCD. The terms of the District's Subcontracts are identical, except for the Districts' names and addresses, and amounts of water to be provided. A true and correct copy of CAIDD's Subcontract is attached hereto at Exhibit 3, and a true and correct copy of MSIDD's Subcontract is attached as Exhibit 4.

* * *

20. Each Subcontract provides in Article 4.1 in part, that the United States, subject to the Repayment Contract (the 1972 Master Contract), "shall deliver Project Water for Agricultural Use by the Subcontractor." "Project Water" as used in the Subcontracts, refers to Central Arizona Project water.

21. Each Subcontract provides in Article 4.2, in part, that its term is "for a period of 50 years beginning with the January 1 of the Year following that in which the Secretary issues the Notice of Contemplation of the Water Supply System." The Secretary issued the Notice of Completion of the Water Supply System during October of 1993.

* * *

25. Articles 5.1 and 5.2 of the Subcontracts require the Districts to pay a 2.00 per acre-foot capital charge (subject to modification), as well as an Agricultural Water Service Charge to cover a portion of the costs of operating, maintaining, and replacing the CAP facilities.

26. Article 5.2(e) of the Subcontracts further provides that the Districts' obligation to pay the charges specified in Articles 5.1 and 5.2 "is a general obligation of the [district] notwithstanding the manner in which the obligation may be distributed among the [district's] water users and notwithstanding the default of individual water users in their obligations to the [district]."

27. Article 5.2(f) of the Subcontracts further provides that payment of said charges is a condition precedent to delivery of water under the Subcontracts.

* * *

31. In 1962, MSIDD was organized as an irrigation and drainage district which operates and has authority pursuant to A.R.S. § 48-2901 *et seq.*

32. In 1964, CAIDD was organized as an irrigation and drainage district which operates and has authority pursuant to A.R.S. § 48-2901 *et seq.*

33. Defendants MSIDD and CAIDD are political subdivisions of the State of Arizona which were organized in part to provide CAP water to their user landowners pursuant to contracts. Defendant Districts deliver water to hundreds of Pinal County farmers. CAIDD covers 87,349.25 acres and includes approximately 214 individual landowners. MSIDD covers 87,142.6 acres and includes approximately 263 individual landowners.

34. The MSIDD and CAIDD Subcontracts " . . . give MSIDD and CAIDD the contractual right to receive Colorado River water through the CAP" to be distributed on behalf of the landowners pursuant to the terms of said Subcontracts, including payment of all costs set forth in Article 5 thereof. See Paragraph 25, supra.

* * *

41. MSIDD constructed an irrigation system to distribute within the district water from the CAP and groundwater from irrigation wells to be acquired from landowners in the district pursuant to water service contracts. . . .

* * *

43. In April 1989, Plaintiffs John E. and Mary Lou Smith entered into one or more identical water service contracts with MSIDD (entitled "Agreement"), which generally allowed the District during the term of such agreement to use the Smith's irrigation wells and irrigation grandfathered groundwater rights. Such water was to be used in conjunction with CAP water for irrigation as determined by the district.

* * *

46. When used in the MOUs and individual agreements for project water service, the "Project" water referred to means any water delivered through the Districts' entire water distribution systems but does not refer to any particular type of water.

47. MSIDD and CAIDD were organized for the benefit of their landowners.

RESPECTFULLY SUBMITTED this 2nd day of January, 2002.

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DUPLICATE – ORIGINAL

Contract No. 14-06-W-245
Amendment No. 1
B.C. Draft 11/28/88

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

CONTRACT BETWEEN THE UNITED STATES AND THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT FOR DELIVERY OF WATER AND REPAYMENT OF COSTS OF THE CENTRAL ARIZONA PROJECT

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

CONTRACT BETWEEN THE UNITED STATES AND THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT FOR DELIVERY OF WATER AND REPAYMENT OF COSTS OF THE CENTRAL ARIZONA PROJECT

1. PARTIES

The parties to this contract, executed as of this first day of December, 1988, are the United States of America, acting through the Department of the Interior, and the Central Arizona Water Conservation District, a multi-county water conservation district organized under the laws of Arizona, with its principal place of business in Phoenix, Arizona.

2. AUTHORITIES

This contract is made pursuant to the:

2.1 Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof and supplementary thereto.

2.2 Boulder Canyon Project Act, approved December 21, 1928, 45 Stat. 1057, a supplement to the Federal Reclamation Laws.

2.3 Reclamation Project Act of 1939, approved August 4, 1939, 53 Stat. 1187, as amended.

2.4 Colorado River Basin Project Act, approved September 30, 1968, 82 Stat. 885, as amended, a supplement to the Federal Reclamation Laws.

2.5 Arizona Revised Statutes, Section 48-3701 *et seq.*

3. RECITALS

3.1 The Colorado River Basin Project Act provides, among other things, that for the purposes of furnishing irrigation water and municipal and industrial water supplies to water-deficient areas in Arizona and western New Mexico through direct diversion or exchange of water, control of floods, conservation and development of fish and wildlife resources, enhancement of recreation opportunities, and for other purposes, the Secretary of the Interior shall construct, operate, and maintain the Central Arizona Project, consisting of the principal works hereinafter described in Article 6.3.

3.2 Pursuant to the provisions of Arizona Revised Statutes, Section 48-3701 *et seq.*, the Central Arizona Water

Conservation District has been organized with the power to enter into a contract or contracts with the Secretary of the Interior to accomplish the purposes of Arizona Revised Statutes, Section 48-3701 *et seq.*

3.3 On December 15, 1972, the United States and the Contractor entered into a contract entitled "Contract Between the United States and the Central Arizona Water Conservation District for Delivery of Water and Repayment of Costs of the Central Arizona Project" (Contract No. 14-06-W-245), whereby, among other things, the United States agreed to construct the Central Arizona Project and the Contractor agreed to repay the costs of the project properly allocable to the Contractor.

3.4 Subarticle 9.3(b) of said contract provides that the Contractor's repayment obligation shall not exceed $1.2 billion.

3.5 Subarticle 9.3(b) of said contract also provides that if the Contractor's repayment obligation will exceed $1.2 billion, the Contracting Officer shall consult with the Contractor and continuation of construction will be contingent upon the execution of an amendatory contract to cover the increased repayment obligation.

3.6 Both parties acknowledge that the Contractor's repayment obligation will exceed $1.2 billion, and have agreed to increase the Contractor's repayment ceiling to a level sufficient to facilitate completion of the project.

4. ARTICLES OF AGREEMENT

NOW, THEREFORE, in consideration of the mutual and dependent stipulations and covenants herein contained, it is agreed by and between the parties hereto as follows:

5. DEFINITIONS

When used herein, unless otherwise distinctly expressed, or manifestly incompatible with the intent hereof, the terms:

5.1 "Federal Reclamation Laws" or "Reclamation Laws" shall mean the Act of June 17, 1902, 32 Stat. 388, and all acts amendatory thereof or supplementary thereto.

5.2 "Basin Project Act" shall mean the Colorado River Basin Project Act, 82 Stat. 885, dated September 30, 1968, as amended, which is a supplement to the Federal Reclamation Laws.

5.3 "Secretary" shall mean the Secretary of the Interior of the United States or his duly authorized representative.

5.4 "Contracting Officer" shall mean the Secretary or his authorized designee acting in his behalf.

5.5 "Contractor" shall mean the Central Arizona Water Conservation District, organized pursuant to Arizona Revised Statutes, Section 48-3701 *et seq.*

5.6 "Service area" shall mean the area now included within the Central Arizona Water Conservation District, consisting of Maricopa, Pinal, and Pima Counties of Arizona and such other counties as may hereafter become part of the District, exclusive of any Indian reservation land lying wholly or partly within said Counties.

5.7 "Subcontractor" shall mean any irrigation district, municipality, individual, or any entity which enters into a water service subcontract with the United States and the Contractor in furtherance of the provisions of the Basin Project Act.

5.8 "Central Arizona Project" or "project" shall mean the project and works authorized by Section 301(a) of the Basin Project Act and constructed by the United States pursuant to the provisions of said Act and this contract.

5.9 "Project works" shall mean the principal works described in Section 301(a) of the Basin Project Act, and appurtenances thereto, or as modified pursuant to Article 6.4 hereof, together with lands, interests in lands, and rights-of-way for such works and appurtenances.

5.10 "Water supply system" shall mean the Navajo Project, Havasu Pumping Plant, the Granite Reef, Salt Gila and Tucson aqueducts and associated pumping plants and appurtenant works, but not including Tucson Terminal Storage or any distribution works.

5.11 "Distribution works" shall mean those facilities constructed or financed by the United States under the authorization in Section 309(b) of the Basin Project Act for the primary purpose of distributing the project water supply within the service area after said project water supply has been transported or delivered through the water supply system.

5.12 "Agricultural water" or "irrigation water" shall mean project water used primarily in the commercial production of agricultural crops or livestock, including domestic use incidental thereto, on tracts of land operated in units of more than 5 acres.

5.13 "Miscellaneous water" shall mean water delivered from the project, or by exchange for project water, for recreational and fish and wildlife purposes at

other than project facilities and shall have a lesser priority of use than agricultural water.

5.14 "Municipal and industrial water," herein referred to as "M&I water," shall mean project water other than agricultural or miscellaneous water delivered by means of the project works.

5.15 "Lands not having a recent irrigation history" shall mean, except where otherwise determined by the Secretary for efficiency of subcontractor's operation, lands which the Secretary determines were not irrigated during the period September 30, 1958, to September 30, 1968.

5.16 "OM&R" shall mean the care, operation, maintenance, and replacement of project works.

5.17 "Exchange water" shall mean Colorado River water made available in exchange for or in replacement of existing supplies from surface sources other than the mainstream of the Colorado River.

5.18 "Transferred works" shall mean such facilities of the water supply system or of other construction stages as to which OM&R responsibility is transferred from the United States to the Operating Agency.

5.19 "Operating Agency" shall mean the entity or entities authorized to assume OM&R responsibility of transferred works and approved for that purpose by the Contracting Officer.

5.20 "Transfer notice" shall mean a written notice or notices, numbered consecutively, which the Contracting Officer transmits to the Operating Agency and which shall designate:

(a) the transferred works;

(b) items of equipment and supplies transferred to the Operating Agency; and

(c) the date upon which such transfer will be effected.

5.21 "Gila River system waters" shall mean waters of the Gila River and tributaries thereof east of the Yuma-Maricopa County line.

5.22 "Notice of completion" shall mean the notice which the Contracting Officer issues to Contractor to announce the substantial completion of a construction stage. Each such notice of completion shall include the estimated amount of the repayment obligation for the construction stage to which the notice pertains, the date of initiation of repayment for the construction stage and indicate the amount and due date for the first payment for the construction stage.

5.23 "Development Fund" shall mean the separate fund, known as the Lower Colorado River Basin Development Fund, established in the Treasury of the United States pursuant to Section 403(a) of the Basin Project Act.

5.24 "Year" shall mean the period January 1 through the next succeeding December 31.

5.25 "Contractor's Construction Cost Repayment Obligation," hereinafter referred to as "repayment obligation," shall mean the total amount of all construction costs including related construction claims and interest thereon, OM&R costs during construction, and interest on costs allocated to the M&I water and power functions during

construction, of the Central Arizona Project, incurred therefor and as determined by the United States and further described in Article 6.2 hereof, excluding reimbursable costs allocated to fish and wildlife and recreation, and costs associated with the delivery of water to entities other than the Contractor or subcontractors, and which is determined by the Secretary, after consultation with the Contractor, to be allocable to and repayable by the Contractor in accordance with the provisions of the Basin Project Act and this contract.

5.26 "Return flow" shall mean all agricultural, M&I, and miscellaneous waste water, seepage, and ground water which originates or results from water contracted for from the Central Arizona Project, but shall not include any water delivered through the project works for ground water recharge purposes.

5.27 "Project water" shall mean (a) all water allocated by the Secretary for project purposes by *Federal Register* notice dated March 24, 1983, and any subsequent reallocation by the Secretary as contemplated in paragraph 6 of said *Federal Register* notice, which water is available pursuant to contracts with the Secretary from: (1) the Colorado River; (2) Central Arizona Project dams and reservoirs; and (3) return flows captured by the Secretary for project use; (b) any water delivered to entities in Arizona, through the project works, as a replacement supply for Cliff Dam; (c) water delivered to water users in Arizona, through the project works, in exchange for water delivered to users in New Mexico from or by means of the project works; and (d) any additional water not included in (a) above, that is required to be delivered by the Secretary through the project, pursuant to the Ak-Chin Water Rights Settlement Act of 1978 (Public Law

95-328), as amended on October 19, 1984 (Public Law 98-530); the Southern Arizona Water Rights Settlement Act of October 12, 1982 (Title III of Public Law 97-293); and, subject to the execution of a settlement agreement by the Contractor providing for the settlement of the water rights claims of the Salt River Pima-Maricopa Indian Community and to the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988 (Public Law 100-512), up to 22,000 acre-feet annually of Colorado River water to be delivered through the project works in accordance with said settlement agreement and legislation.

5.28 "Indian lands" shall mean the lands within any Indian reservation for which an allocation of project water has or will be made by the Secretary for delivery through project works.

5.29 "Navajo Project" shall mean the interests of the United States in the Navajo Generating Station and the Transmission System, or any replacement thereof, as authorized by Section 303 of the Basin Project Act and as described in contracts entered into pursuant to that Act.

5.30 "Construction stage" shall mean any one of the following: (1) the water supply system; (2) New Waddell and Modified Roosevelt Dams; (3) replacement features or programs for Cliff Dam; (4) Tucson terminal storage; (5) Hooker Dam or suitable alternative; and (6) Buttes Dam.

5.31 "Plan 6" shall mean Plan 6 for the Regulatory Storage Division of the Central Arizona Project as approved by Record of Decision of the Secretary dated April 3, 1984 as amended and supplemented by Records of Decision of the Secretary dated May 20, 1986 (Supplement One) and June 17, 1988 (Supplement Two).

5.32 "Allocable cost" shall mean (a) with respect to the project, the total project cost less (1) the cost of non-Indian distribution works, (2) the cost of the safety of dams component of Plan 6, (3) the cost of Indian distribution systems, (4) the cost of the Colorado River Division and the New Mexico fish hatchery, (5) the cost of cultural resources studies, (6) the contributions provided by the States of Arizona and New Mexico prior to execution of the Plan 6 Funding Agreement, (7) the costs of Charleston Dam and San Pedro Aqueduct, (8) the cost of 500 cubic feet per second of incremental capacity in the Granite Reef Aqueduct and related costs in the Navajo Project, and (9) such other costs as determined appropriate by the Contracting Officer; and (b) with respect to each construction stage, the total cost of such stage less that portion of the following costs associated with such stage: (1) the cost of the safety of dams component of Plan 6, (2) the cost of cultural resources studies, (3) the contributions provided by the States of Arizona and New Mexico prior to execution of the Plan 6 Funding Agreement, (4) the cost of 500 cubic feet per second of incremental capacity in the Granite Reef Aqueduct and related costs in the Navajo Project, and (5) such other costs as determined appropriate by the Contracting Officer.

5.33 "OM&R Transfer Contract" shall mean the August 5, 1987, contract entitled "Contract Between the United States of America and the Central Arizona Water Conservation District for the Transfer of Operation and Maintenance of Facilities" (Contract No. 7-07-30-W0167), and any amendment or revision thereof.

5.34 "Overall repayment period" shall mean the period of time beginning with initiation of repayment of

the first construction stage and ending with final payment of the last construction stage.

5.35 "Plan 6 Funding Agreement" shall mean the April 15, 1986, agreement entitled "Agreement Among the United States, the Central Arizona Water Conservation District, the Flood Control District of Maricopa County, the Salt River Agricultural Improvement and Power District and Salt River Valley Water Users' Association, the Arizona Cities of Chandler, Glendale, Mesa, Phoenix, Scottsdale, and Tempe, the State of Arizona, and the City of Tucson for Funding of Plan Six Facilities of the Central Arizona Project, Arizona, and for other Purposes," as it may be supplemented or amended.

5.36 "Permanent service" shall mean that water supply service commencing in the year following substantial completion of the water supply system and continuing in perpetuity.

5.37 "Ground water recharge" shall mean the recharge of water pursuant to title 45, chapter 2, article 13, Arizona Revised Statutes, or the underground storage and recovery of water pursuant to title 45, chapter 3, Arizona Revised Statutes, or as said statutes may hereafter be amended or revised.

5.38 "Project power" shall mean the United States' entitlement to capacity and energy from the Navajo Project.

6. PROJECT CONSTRUCTION

6.1 Agreement of the United States. Subject to the terms and conditions of this contract and within the limits of the funds made available therefor by Congress, the United States will expend toward the construction of the project, exclusive of interest costs during construction, $832,180,000 based on 1967 cost estimates, plus or minus

such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indices applicable to the types of construction involved therein, or so much of such amount, as in the opinion of the Secretary, is necessary to construct said project, whichever amount is the lesser. The aforementioned amount includes the United States' costs of participation in the Navajo Project.

6.2 Costs of Protect.

(a) The estimated construction cost of $832,180,000 for the project, based upon 1967 prices, has been determined as follows:

Main System	$ 1,000's
Granite Reef Division	407,740
Orme Division	42,340
Salt-Gila Division	47,170
Tucson Aqueduct (Colorado River source)	46,300
Buttes Dam	35,240
Navajo Project	106,000
Subtotal	684,790
Other Separate Features	
Hooker Dam or suitable alternative	31,730
Charleston Dam and San Pedro Aqueduct (San Pedro River source)	36,420
Subtotal	68,150
Miscellaneous Features	
*Gila River Division	5,250
Indian Distribution System	19,970
Colorado River Division	42,450
Drainage System	11,570
Subtotal	79,240
Total Project	$832,180

*Note: Fish hatchery costs, some of which may be located on the Colorado River.

Provided, however, That (i) the adjustment provisions of Article 6.1 apply to the total construction costs of the project and not to the costs of the individual line items set out in this Subarticle 6.2(a), and (ii) in accordance with provisions of Article 6.4 herein, the references to the individual line items set out in this Subarticle 6.2(a) are not to be deemed a determination that each of the features referred to in the individual line items will be constructed or that costs will be incurred for each of said individual line items based upon a percentage which the estimated costs for each individual line item bears to the project's total estimated construction costs.

(b) The Central Arizona Project costs incurred by the United States which are to be repaid by Contractor shall include the share allocated to the Contractor of (i) construction costs of the project, (ii) all expenses of whatsoever kind or nature heretofore or hereafter incurred by the United States in connection with, growing out of, or resulting from the construction, and (iii) the OM&R during construction of project works. The aforementioned share of allocated costs shall also include, but shall not be limited to, interest during construction on costs allocated to the M&I water and power functions, the cost of labor, materials, equipment, engineering, legal services, surveys, investigations, property, superintendence, administration, overhead, general expenses, special services, damages of all kinds and character, inspection, repair, and protection of project works and water supply, and the costs of all lands, interests in lands, and rights-of-way acquired by the United States for the project, all as determined by the Secretary.

6.3 Principal Works of the Project. The works and facilities to be constructed under this contract shall consist of the following principal works:

(a) A system of main conduits and canals, including the Havasu Pumping Plant and a main canal and pumping plants (Granite Reef Aqueduct and pumping plants), for diverting and carrying water from Lake Havasu to the confluence of the Salt and Verde Rivers, which system will have a capacity of 3,000 cubic feet per second;

(b) Salt-Gila Aqueduct and pumping plant;

(c) Tucson Aqueduct and pumping plants;

(d) New Waddell and Modified Roosevelt Dams;

(e) replacement features or programs for Cliff Dam;

(f) Tucson Terminal Storage (if approved by the Secretary);

(g) Buttes Dam and Reservoir;

(h) Hooker Dam and Reservoir or suitable alternative which shall be constructed in such manner as to give effect to the provisions of Section 304(f) of the Basin Project Act;

(i) Charleston Dam and Reservoir and the San Pedro Aqueduct;

(j) related canals, regulating facilities, and electric transmission facilities required for the operation of said principal works;

(k) related water distribution and drainage works; and

(l) appurtenant works.

No works or facilities for the treatment of water are included in the project works to be constructed by the United States. Nothing contained herein shall be construed to indicate the order in which the aforedescribed works will be constructed.

6.4 Changes in Project Works. Should the Secretary, either before or during construction, determine it to be in the best interests of the project, he may, upon the completion of the studies currently being made or to be made, including land classifications, hydrological, engineering, geological, sedimentation, water supply, and repayment ability, and after consultation with the Contractor, change the location, size, or capacity of any of the project works, or may eliminate works, or add works to those described above, and the Secretary's decision on such changes, eliminations, and additions shall be conclusive.

6.5 Construction Conditions. The United States shall be under no obligation to commence or, having commenced, to continue construction of project works until transfer from the State of Arizona of such State-owned lands or interests therein, in a form acceptable to the Attorney General of the United States, as the Secretary determines is necessary in the construction, operation, or maintenance of the project.

6.6 Annual Work Program. During construction of the project works the Contracting Officer will consult with the Contractor and/or with any subcontractor through or within whose service area project works are to

be constructed to achieve maximum coordination between such construction program and the annual programs of any affected subcontractor. Within 30 days following the enactment by Congress and Presidential approval of annual or supplementary appropriation acts and the allotment of funds thereunder for continued construction of the project, the United States will furnish the Contractor with a notice and statement showing the proposed construction program for the balance of the current fiscal year and for the following fiscal year or years. If so requested in writing by the Contractor within 30 days of its receipt of such notice, the Secretary will consult with the Contractor and/or the affected subcontractor with respect to the proposed program. The action of the Contracting Officer concerning the program after such consultation shall be final.

6.7 Inability of the United States to Complete Project on Basis of Cost Estimates. If construction of the project works shall have been commenced but, prior to completion, the Secretary determines that the cost of constructing the project will exceed the maximum amount to be expended therefor by the United States as provided for in Article 6.1 hereof, the Secretary may after consultation with the Contractor terminate construction and declare the obligations of the United States hereunder with regard to completion of construction of the project to have been fulfilled. If appropriations for the continuance and/or completion of construction in amounts sufficient in the opinion of the Secretary to complete said construction are authorized by Congress and are available, the Secretary shall consult with the Contractor and shall make continuation of construction contingent upon the execution of an amendatory contract with the Contractor wherein

the Contractor's maximum repayment obligation is increased so as to cover the increased reimbursable costs as determined by the Secretary; *Provided, however,* That the Contractor shall not utilize any part of the completed or unfinished project facilities in the absence of written agreement with the Secretary for reimbursement therefor.

7. PROJECT OPERATION, MAINTENANCE, AND REPLACEMENT

7.1 Operation and Maintenance and Water Deliveries by the United States Prior to Completion of Construction. Except as provided in the OM&R Transfer Contract, prior to completion of project works by the United States, as determined and announced to the Contractor in writing by the Secretary, the United States will operate and maintain said project facilities. The cost of said OM&R allocated to the Contractor shall be included in the Contractor's repayment obligation; *Provided, however,* That said OM&R cost shall not be included with the project cost ceiling set out in Article 6.1 hereof. During the aforesaid period, project water, if available, may be disposed of by the Secretary at charges which the Secretary determines to be appropriate; *Provided, however,* That to the extent deemed feasible by the Secretary, preference will be given to subcontractors and Indian lands. Payment for water shall be made in advance by the water user. The places of measurement and delivery of said water shall be established by the Secretary after consultation with the Contractor. Except as provided in the OM&R Transfer Contract, the proceeds accruing from the disposal of such water shall be credited to the Development Fund and applied toward the costs of the project as determined by the Secretary.

7.2 Operation and Maintenance and Water Deliveries after Completion of Construction. Except as provided in the OM&R Transfer Contract and any future agreements for the transfer of OM&R of the project works or portions thereof, upon completion of construction of a construction stage or upon completion of construction of the project, the United States shall operate and maintain such construction stage or the project and shall make project water available to project water users.

8. DELIVERY OF WATER

8.1 Obligation of United States. Subject to the terms, conditions, and provisions set forth herein, the United States will deliver project water to Contractor and, during such periods as it operates and maintains the water supply system, the United States will also transport and deliver said water to the subcontractors. After transfer of OM&R the United States will awake deliveries of Colorado River water to the Operating Agency; deliveries of other project waters will be made pursuant to determinations made by the Secretary.

8.2 Term of Contract. Subject to the terms, conditions, and provisions set forth herein, this contract is for permanent service.

8.3 Conditions Relating to Delivery.

(a) The obligation of the United States to deliver water under this contract is subject to:

(i) The availability of such water for use in Arizona under the provisions of the Colorado River Compact, executed November 24, 1922;

the Boulder Canyon Project Act, 45 Stat. 1057, dated December 21, 1928; the Colorado River Basin Project Act, dated September 30, 1968, 82 Stat. 885; the contract between the United States and the State of Arizona, dated February 9, 1944; the Opinion of the Supreme Court of the United States in the case of *Arizona* v. *California et al.*, 373 U.S. 546, rendered June 3, 1963; and the March 9, 1964, Decree of that Court in said case, 376 U.S. 340, as amended on February 28, 1966, at 383 U.S. 268, and supplemented on January 9, 1979, at 439 U.S. 419, as now issued or hereafter modified.

(ii) Executive A, Seventy-eighth Congress, Second Session, a treaty between the United States of America and the United Mexican States, signed at Washington on February 3, 1944, relating to the utilization of the water of the Colorado River and Tijuana River and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico, and Executive H, Seventy-eighth Congress, Second Session, a protocol signed at Washington on November 14, 1944, supplementary to the Treaty.

(iii) The express understanding and agreement by the Contractor that this contract is subject to the condition that Hoover Dam and Lake

Mead shall be used: first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of the Colorado River Compact approved by Section 13(a) of the Boulder Canyon Project Act; and third, for power; and furthermore, that this contract is made upon the express condition and with the express covenant that all rights hereunder shall be subject to and controlled by the Colorado River Compact and that the United States and the Contractor shall observe and be subject to and controlled by said Colorado River Compact and Boulder Canyon Project Act in the construction, management, and operation of Hoover Dam, Lake Mead, canals and other works, and the storage, diversion, delivery, and use of water to be delivered to Contractor hereunder.

(iv) The right of the United States temporarily to discontinue or reduce the amount of water to be delivered hereunder whenever such discontinuance or reduction is made necessary for purposes of investigations, inspections, replacements, maintenance, or repairs to any works whatsoever affecting, utilized or, in the opinion of the Secretary, necessary for delivery of

water hereunder, it being understood that so far as feasible the United States will (1) do so during periods of low water demands and (2) give reasonable notice in advance of such temporary discontinuance or reduction.

(b) Delivery of Colorado River water by the United States under this contract shall be charged to the State of Arizona's apportionment under the aforementioned Supreme Court Decree of March 9, 1964, in *Arizona* v. *California* and will discharge to that extent the obligation of the United States to deliver water under the aforementioned contract between the United States and the State of Arizona, dated February 9, 1944.

8.4 Delivery Points. Colorado River water to be furnished to the Contractor pursuant to this contract will be delivered by the United States in the Colorado River at the point of diversion from Lake Havasu where the intake structures of the Havasu Pumping Plant are constructed. Aqua Fria and Upper Gila River system waters will be delivered to the Contractor at New Waddell and Buttes Dams, respectively. Delivery points for other project water supplies and for return flows will be determined by the Contracting Officer after consultation with the Contractor and/or the affected subcontractor therefor.

8.5 Measurement.

(a) The quantity of Colorado River water pumped from Lake Havasu for the project shall be measured by means of measuring devices to be installed as part of the project works. If, for any reason, in the opinion of the Secretary, said measuring devices shall fail to operate

satisfactorily, the Secretary will, from the best information available, estimate the amount of water delivered to the Contractor.

(b) Deliveries of project water to the various subcontractors shall be measured by means of measuring devices to be installed as part of the project works at the points along the various aqueducts at which such water may be diverted for each of said subcontractors, and/or at the points in the various reservoirs formed by the dams constructed as part of the project works at which such water may be diverted for subcontractors and/or at the points where return flow may be delivered. These points of measurement will be established by the Secretary after consultation with Contractor and the affected subcontractor. If, for any reason, in the opinion of the Secretary, said measuring devices shall fail to operate satisfactorily, the Secretary will, from the best information available and after consultation with the Contractor and the affected subcontractor, estimate the amount of water delivered to each such subcontractor. The Secretary shall at all times have access over any lands and rights-of-way of a subcontractor for the purpose of inspecting and checking said measuring devices.

8.6 Responsibility for Distribution of Water after Leaving Water Supply System. Whether or not the United States operates and maintains the project facilities, the United States shall not be responsible for the control, carriage, handling, use, disposal, or distribution of water after said water has been diverted from the water supply system. At such time as the Operating Agency assumes responsibility for the OM&R of project works, the responsibility for diversion, carriage, and transportation of the water through the water supply system shall be the sole

responsibility of the Operating Agency. Responsibility for distribution of water beyond the water supply system shall be that of the subcontractors to whom said water is delivered from the water supply system. The United States, its officers, agents, and employees, shall not be liable for damage or claim of damage of any nature whatsoever for which there is legal responsibility arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such water, and each subcontractor shall hold the United States, its officers, agents, and employees, harmless from any and all such claims.

8.7 Quantity of Water to be Delivered.

(a) The Secretary reserves the right to determine that quantity of Colorado River water to be released each year from Lake Mead for use by the Central Arizona project pursuant to applicable law, which shall include the quantity of water which may be allocated by the Secretary for use on Indian lands.

(b) The quantity of Colorado River water available under this contract for project purposes shall not exceed the quantity of water available to Arizona under the aforementioned Supreme Court Decree in *Arizona* v. *California* and in Arizona's water delivery contract with the United States after first providing for satisfaction of:

(i) present perfected rights and perfected rights described in Article II(D) of the Decree and the rights of other Federal reservations established prior to September 30, 1968; *Provided, however,* That the quantities of Colorado River water reserved to satisfy the aforesaid rights shall not, except as provided

in said Decree, be reduced under any circumstances or for any reason whatsoever including, without limitation, a temporary use permitted by the Secretary by other water users in Arizona, California, or Nevada, of water reserved pursuant to the foregoing but not needed during any calendar year; And *provided further,* That no rights to the recurrent use of such water shall accrue by reason of said temporary use; and

(ii) the quantities of water provided for in all water delivery contracts between the United States and water users in Arizona as of September 30, 1968.

(c) The quantity of Colorado River water available under this contract for project purposes, including water for use on Indian lands shall have the same priority as to delivery as the quantities of Colorado River water delivered pursuant to water delivery contracts, Federal reservations of water, and other arrangements between the United States and water users in Arizona entered into subsequent to September 30, 1968, for use of Colorado River water on Federal, State or privately owned lands in Arizona in total quantities not to exceed 164,652 acre-feet of diversions per year; *Provided, however,* That the Contractor shall hold the United States, its officers, agents, employees, and successors or assigns, harmless as to any and all claims for damages to persons or to property direct or indirect and of whatever nature, arising out of or which may in any manner be connected with the operation and/or effect of this Subarticle.

(d) The limitation on contracting in Subarticle 8.7(c) above shall not apply to contracts with holders of present perfected rights to Colorado River water in Arizona or to the Secretary's order of November 24, 1982, reserving Colorado River water for the Cibola National Wildlife Refuge. Nothing in Subarticle 8.7(c) shall restrict the right of the Secretary under water service contracts referred to in said Subarticle to terminate and/or reduce any entity's entitlement to Colorado River water and to make that entitlement available to other water users in Arizona.

(e) During any year when the subcontractors cannot use any portion of their entitlement to project water, and such water cannot be resold or exchanged in accordance with the terms and conditions of the water service subcontracts, the Contractor shall have the right in its discretion to resell any or all of such water or to use any or all of such water for ground water recharge purposes, including the subsequent recovery and resale of such water, subject to Federal law, including but not limited to the Reclamation Reform Act of 1982, State of Arizona law, and such rules and regulations as the Secretary may deem appropriate. Subject to the terms and conditions of water service subcontracts, the water orders of all subcontractors shall be met before any project water is made available to the Contractor under this provision.

8.8 Subcontracts.

(a) The United States shall be a party to subcontracts.

(b) The Secretary and the Contractor shall require in each subcontract that:

(i) unless and until otherwise provided by Congress, water from the Central Arizona Project shall not be made available directly or indirectly for the irrigation of lands not having a recent irrigation history, as determined by the Secretary, except in the case of Indian lands, national wildlife refuges, and, with the approval of the Secretary, State-administered wildlife management areas;

(ii) there be in effect measures, adequate in the judgment of the Secretary and the Contractor, to control expansion of irrigation from aquifers affected by irrigation in the Contractor's service area and to reduce pumping of ground water in the agricultural subcontractors' service areas by the amount of project water received by said agricultural subcontractors;

(iii) the canals and distribution systems through which water is conveyed after its delivery to the subcontractors shall be provided and maintained with linings adequate in the Secretary's judgment to prevent excessive conveyance losses;

(iv) neither the Secretary, the Contractor nor any subcontractor shall pump or permit others to pump ground water from within

the exterior boundaries of the service area of a subcontractor receiving water from the Central Arizona Project for any use outside of said subcontractor's service area unless the Secretary, the Contractor, and such subcontractor shall agree, or shall have previously agreed, that a surplus of ground water exists and that drainage is or was required;

(v) except as otherwise agreed by the Contracting Officer, neither the Contractor nor any subcontractor shall sell or otherwise dispose of or permit the sale or other disposition of any project water, including return flows, for use outside the Contractor's service area;

(vi) irrigation water made available thereunder may be made available by the Secretary for M&I purposes if and to the extent that such water is no longer required by the subcontractor for irrigation purposes and shall be made available in all cases where lands receiving project water have been converted to municipal and industrial use; *Provided, however,* That subcontracts effectuating such transfers are subject to the approval of the Secretary and the Contractor, which approval shall not be withheld unreasonably; And *provided further,* That it shall be deemed unreasonable for

the Secretary or the Contractor to withhold such approval on the basis that the right to convert from irrigation to M&I use for a specific development could better be exercised in some other subcontractor's service area. The water so converted from irrigation to M&I purposes will be delivered with the same priority and at the same rate per acre-foot as other M&I water. Likewise, subcontracts for furnishing water for M&I purposes, including, but not limited to, ground water recharge to the extent ground water recharge is consistent with Arizona law, shall provide that, if water to be delivered thereunder is not presently required for such purposes, such water may be made available by the Secretary to other users; *Provided, further,* That the subcontractor shall be relieved of its payment obligation under its subcontract only to the extent of the amount paid by such other users;

(vii) the acreage limitation provisions of Reclamation Laws shall apply solely to agricultural water service;

(viii) except as specifically provided therein, it shall be the provisions of this contract which shall be controlling in the event of any inconsistency between this contract and any subcontract;

(ix) the subcontractor shall levy all necessary assessments, tolls, and other charges and shall use all of the authority and resources available to the subcontractor to collect the same in order that the subcontractor may meet its obligations thereunder to make in full all payments required under said subcontract on or before the date such payments become due and to meet other obligations under the subcontracts;

(x) the subcontractor establish, maintain, and provide the United States and the Contractor with land, water use, and crop census records.

8.9 Shortages. As provided in Section 301(b) of the Basin Project Act, Article II(B)(3) of the Decree of the Supreme Court of the United States in *Arizona* v. *California,* 376 U.S. 340, dated March 9, 1964, shall be so administered that in any year in which, as determined by the Secretary, there is insufficient mainstream Colorado River water available for release to satisfy the annual consumptive use of 7,500,000 acre-feet in Arizona, California, and Nevada, diversions from the mainstream of the Colorado River for the Central Arizona Project and for other uses in Arizona under contracts or other agreements with the United States executed subsequent to September 30, 1968, shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of

California served under contracts existing as of September 30, 1968, with the United States by diversion works heretofore constructed, and by other Federal reservations in California of 4,400,000 acre-feet of Colorado River water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of said Section 301(b), nor shall said Section affect the relative priorities, among themselves, of water users in Arizona, California, and Nevada which are senior to diversions for the Central Arizona Project, or amend any provisions of said Decree. The aforesaid limitation stated in Section 301(b) shall not apply so long as the Secretary shall determine and proclaim that means are available and in operation which augment the water supply of the Colorado River system in such quantity as to make sufficient Colorado River mainstream water available for release to satisfy annual consumptive use of 7,500,000 acre-feet in Arizona, California, and Nevada.

8.10 Rate of Diversions of Colorado River Water. Subject to (a) the first proviso in Section 301(a) of the Basin Project Act, (b) the provisions of Subarticle 10.6(b) hereof, and (c) the provisions of Subarticle 8.7(a) hereof, any capacity in the Granite Reef Aqueduct in excess of 2,500 cubic feet per second may be utilized in the operations of the project so as to maximize project benefits; *Provided*, *however*, That the use of such capacity shall not result in the annual diversion of a quantity of water in excess of the project's legal entitlement under the Basin Project Act.

8.11 Priority in Case of Shortage.

(a) Subject to the provisions of Section 304(e) of the Basin Project Act and the Secretary's allocation decisions published in the *Federal Register* on December 10, 1980, and March 24, 1983, any project water as defined in Subarticle 5.27(a) hereof, furnished through project facilities shall, in the event of shortages thereof, be reduced pro rata until exhausted, first for miscellaneous uses and next for agricultural uses, before such project water furnished for M&I uses is reduced. Thereafter, such project water for M&I uses will be reduced pro rata among all M&I water users. Each subcontract or other water delivery arrangement entered into pursuant to this contract shall so provide. This article shall not apply to Indian uses; *Provided*, *however*, That the relative priorities between Indian and non-Indian uses shall be as determined by the Secretary. Notwithstanding the provisions of this Subarticle, project water made available as a result of construction and operation of modifications to Roosevelt Dam as part of Plan 6 shall be distributed as provided in the Plan 6 Funding Agreement, and shall not be subject to reduction in the event of shortages of other project water supplies.

(b) Any project water, is defined in Subarticles 5.27(b), (c) and (d) hereof, shall retain its priority relative to project water as defined in Subarticle 5.27(a) hereof.

8.12 No Guarantee of Availability of Water. The United States assumes no responsibility with respect to the quantity of water available for delivery pursuant to this contract. In no event shall the United States, its officers, agents, or employees, be liable for any damages,

direct or indirect, of whatsoever nature, arising out of or in any way connected with any suspension or reduction in the delivery of water pursuant to this contract or with any shortage in the quantity of water available for delivery hereunder or to any subcontractor for any cause whatsoever including, but not limited to, drought, delay in the construction of the Navajo Project, the failure of the Navajo Project to be completed, or the lack of power for pumping.

8.13 Secretarial Control of Return Flow.

(a) The Secretary reserves the right to capture all return flow flowing from the exterior boundaries of the Contractor as a source of supply and for distribution to and use of the Central Arizona Project to the fullest extent practicable. The Secretary also reserves the right to capture for project use return flows within the boundaries of Contractor if in his judgment such return flow is not being put to a beneficial use. Any subcontractor may sell its return flow; *Provided, however*, That except as otherwise agreed by the Contracting Officer, such return flow may not be sold for use outside the Contractor's exterior boundaries; *And provided further*, That if the price received for such return flow is higher than the price paid for such project water, the amount of the excess price shall be paid by such subcontractor to the Contractor for application against the Contractor's repayment obligation to the United States.

(b) Any return flow captured by the United States and determined by the Secretary to be suitable and available for use on lands within the service area and/or by any subcontractor therein may be delivered by the United States to a subcontractor as a part of the water

supply for which the subcontractor contracts hereunder and such water shall be accounted and paid for pursuant to the provisions hereof.

8.14 Water and Air Pollution Control. The Contractor, in carrying out this contract, shall comply with all applicable water and air pollution laws and regulations of the United States and the State of Arizona, and shall obtain all required permits or licenses from the appropriate Federal, State, or local authorities.

8.15 Quality of Water. The operation and maintenance of project facilities shall be performed in such manner as is practicable to maintain the quality of project water made available through such facilities at the highest level reasonably attainable as determined by the Contracting Officer or the Operating Agency. Neither the United States nor the Operating Agency warrants the quality of water and are under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water.

8.16 Exchange Water. Where the Secretary determines that a subcontractor is physically able to receive Colorado River mainstream water in exchange for or in replacement of existing supplies of surface water from sources other than the Colorado River to provide water supplies for users upstream from New Waddell, Modified Roosevelt and Buttes Dams, the Secretary may require that said subcontractor agree to accept said mainstream water in exchange for or in replacement of said existing supplies pursuant to the provisions of Section 304(d) of the Basin Project Act.

8.17 Rights Reserved to the United States to Have Water Carried by Project Facilities. As a condition to

the construction of project facilities and the delivery of water hereunder, the Contractor agrees that all project facilities will be available for the diversion, transportation, and carriage of water for Indian and non-Indian uses pursuant to arrangements or contracts therefor entered into on their behalf with the Secretary. In the event the responsibility for the OM&R of project facilities is transferred to and assumed by the Operating Agency, such transfer shall be subject to the condition that the Operating-Agency shall divert, transport, and carry such water for such uses pursuant to the provisions of the aforesaid arrangements or contracts; *Provided, however*, That the aforesaid arrangements or contracts will include provisions for the payment of applicable construction costs and OM&R costs in accordance with Articles 9.3 and 9.6 of this contract.

8.18 Wheeling Non-Project Water. After taking into consideration the water delivery requirements of contracts for project water service and subject to availability of project capacity, non-project water may be wheeled through project facilities pursuant to wheeling agreements between the Contractor and the entity desiring to use project facilities for wheeling purposes. All such agreements shall be subject to the approval of the Contracting Officer who shall consider, among other things, the impact that the wheeling of such non-project water will have on the quality of project water. The Contractor and the Contracting Officer shall jointly develop a standard form of wheeling agreement including the rate structure for wheeling non-project water. All wheeling charges shall be paid to the Contractor by the entity contracting for the wheeling of non-project water. The Contractor shall be

entitled to retain revenues from wheeling charges sufficient to cover all OM&R costs associated with wheeling such non-project water, plus an administrative charge to be jointly determined by the Contractor and the Contracting Officer. All revenues from wheeling charges in excess of the OM&R costs and administrative charges shall be remitted by the Contractor to the Contracting Officer and deposited into the Development Fund.

8.19 Use of Project Power to Wheel Non-Project Water. If the energy requirements necessary for the pumping of project water are met and subject to the requirements of the Navajo Power Marketing Plan published in the *Federal Register* on December 21, 1987, project power may be used to wheel non-project water through project facilities under such conditions of use, including amounts, times of use, losses, costs, and other conditions as are established by the Contractor and approved by the Contracting Officer.

9. PAYMENT OF PROJECT COSTS ALLOCATED TO CONTRACTOR

9.1 Allocation of Construction Costs.

(a) Upon completion of each construction stage, the Contracting Officer will allocate costs to the various project purposes using the separable costs-remaining benefits procedure.

(b) For repayment purposes the reimbursable cost allocated to irrigation and M&I water by the separable costs-remaining benefits procedure will be combined and will hereinafter be termed the "water supply allocation." Upon completion of each construction stage,

and at the periodic intervals specified in Subarticle 9.3(d), suballocation of the water supply allocation will be made to the irrigation and M&I water functions proportional to the water estimated to be used for each purpose during the repayment period of each construction stage. The cost thus suballocated to the irrigation function will hereinafter be termed the "interest-free allocation." The cost thus suballocated to the M&I water function shall be added to the cost allocated to the commercial power function, plus interest during construction for both, and the sum will hereinafter be termed the "interest-bearing allocation."

(c) During construction, simple interest at the rate of 3.342 percent per annum shall be charged on costs allocated to the interest-bearing function as adjusted by the Secretary (i.e., net disbursements reduced by contract holdbacks, revenues applied to construction cost, and nonreimbursable expenses financed from construction funds). The total amount of all interest thus accumulated through the construction period prior to the date of completion of each construction stage shall be added to and become part of the actual construction cost of each construction stage. Interest during construction shall not accrue during any period in which construction is deferred or postponed by the United States as a result of a national emergency, as determined by the Secretary, if authority to forego such interest exists or is made available to the Secretary.

9.2 Repayment Concepts.

(a) Costs suballocated to non-Indian irrigation water will be paid by the subcontractors to the Contractor on the basis of their ability to pay as determined by the Secretary.

(b) Costs allocated to commercial power and costs suballocated to M&I water use shall be combined and repaid with interest at a rate of 3.342 percent per annum on the unpaid balance.

(c) Reimbursable costs allocated to recreation and fish and wildlife are anticipated to be covered by a separate contract and repaid by the beneficiaries thereof.

(d) Repayment of costs allocated to irrigation of Indian lands shall be governed by the provisions of Section 402 of the Basin Project Act.

(e) Repayment of the project will occur by construction stages, with each stage having a separate 50-year repayment schedule. Upon completion of each cost allocation study referred to in Subarticle 9.1(a), subsequent to the initial study associated with the first construction stage, the Contractor's repayment obligation and the obligation allocated to each construction stage will be adjusted based on the latest cost allocation study, and the Contractor will be provided with a revised repayment schedule for the project and each construction stage. The Contracting Officer will adjust previous principal and interest payments made by the Contractor to reflect the new repayment schedule. For each year where an adjustment in payments is necessary, there will be an over or underpayment which will accrue with interest at the rate of 3.342 percent per annum (compounded annually) to the adjustment date. If the adjustment indicates that the Contractor overpaid principal and interest, the Contractor shall be entitled to a credit against its next payments to the United States. Conversely, if the Contractor owes additional principal and interest to the United States, such amount shall be paid to the United States by the

Contractor within 12 months of receipt of a statement therefor from the Contracting Officer. The Contractor may use the repayment reserve fund under Subarticle 10.3(b) hereof for any payment to the United States required as a result of the above adjustment.

9.3 Contractor's Construction Cost Repayment Obligation.

(a) The Contractor's repayment obligation shall consist of the total cost allocated to the water supply and power functions plus OM&R during construction and interest during construction on costs allocated to the M&I water and power functions, but shall not include costs allocated to fish and wildlife and recreation, and costs associated with the delivery of water to entities other than the Contractor or subcontractors. Such entities shall include but not be limited to Indian tribes and councils in central Arizona receiving project water and the New Mexico recipients of water service from Hooker Dam or suitable alternative. The costs to be excluded shall be calculated as follows:

(i) Costs excluded from the Contractor's repayment obligation for New Mexico water service shall be determined by multiplying the project costs allocated to the water supply function by the ratio developed by dividing the quantity of project water projected to be delivered throughout the overall repayment period to water users in Arizona in exchange for water delivered to users in New Mexico from or by means of project works, by the total quantity of Colorado River water

projected to be delivered by the project throughout the overall repayment period.

(ii) The amount of other project costs which shall be excluded from the Contractor's repayment obligation shall be determined by multiplying the project costs allocated to the water supply function by a ratio developed by dividing the quantity of project water projected to be delivered throughout the overall repayment period to entities other than the Contractor, the subcontractors, and those users in New Mexico to whom water has been made available through the construction of Hooker Dam or suitable alternative by the total quantity of project water projected to be delivered throughout the overall repayment period; *Provided*, That project water projected to be delivered to such users will be computed based on an assumption of full development not later than the year 2005.

(b) The costs determined under Subarticles 9.3(a)(i) and (ii) above shall be subtracted from the water supply costs obtained from the separable costs-remaining benefits procedure to determine the Contractor's water supply costs. The Contracting Officer shall suballocate the Contractor's water supply costs to each of the construction stages based on the ratios obtained by dividing the allocable cost of the construction stage by the allocable cost of the project (see Operation 1, Exhibit "A"). The water

supply costs assigned to each construction stage are then further suballocated between irrigation and M&I water use in proportion to projected total water deliveries to each function over the 50-year repayment period of each construction stage (Operation 2, Exhibit "A"). The summarization of the suballocations to each construction stage determines the total water supply cost to be assigned to irrigation and M&I water use (Operation 3, Exhibit "MA"). To determine the Contractor's repayment obligation, the Contractor's water supply suballocation to irrigation and M&I water uses, and the power allocation from the separable costs-remaining benefits procedure, shall each be adjusted for any revenues received by the United States prior to the notice(s) of completion and for any contributions received by the United States under the Plan 6 Funding Agreement for the features constructed in that stage, and for the 500 cubic feet per second of incremental capacity in the Granite Reef Aqueduct and pumping plants (see Article 9.7) to determine the net amount of each function assigned to the Contractor (Operation 4, Exhibit "A"). The Contractor's repayment obligation shall be the summation of the net amount for each function.

(c) Once the Contractor's estimated or final repayment obligation has been determined by the Contracting Officer, the obligation shall be allocated to each construction stage based on the ratio obtained by dividing the allocable cost of each construction stage by the allocable cost of the project. Each construction stage will have a separate 50-year repayment period. The repayment obligation for each stage will be divided into interest-bearing and interest-free components. The interest-free component shall be the amount allocable to irrigation purposes for the stage. The interest-bearing component

will be the amount obtained by subtracting the irrigation allocation for the stage from the obligation for the stage. The principal payments for each stage shall be determined by applying the percentages in Subarticle 9.3(f) to the repayment obligation for each stage. The total payment for each stage for any year shall be equal to the principal payment plus interest at the rate of 3.342 percent per annum on the unpaid interest-bearing component of the repayment obligation for each stage. For the water supply system, the portion of each principal payment which it made by the Contractor from irrigation revenues received by the Contractor each year will be used by the United States to reduce the interest-free obligation. The remaining portion of the principal payments made by the Contractor each year for the water supply system will be used by the United States to reduce the interest-bearing obligation, and once the interest-bearing obligation has been retired, the entire principal payment made by the Contractor will be applied by the United States toward the interest-free obligation. For the other construction stages, the entire principal payment made by the Contractor each year for such stages will be applied by the United States to reduce the interest-bearing obligation first, and once such obligation has been retired, to reduce the interest-free obligation.

(d) At 7-year intervals following the determination of the Contractor's repayment obligation for the water supply system, or at more frequent intervals if it becomes apparent to the Contracting Officer that a significant change in water use has or will occur, until such time as the interest-bearing obligation for each construction stage has been repaid, the Contracting Officer will re-estimate the proportions of total water deliveries to

irrigation and M&I water use over the 50-year repayment period for each stage. At such intervals, the Contracting Officer will adjust the original interest-bearing and interest-free allocation for each stage based on the new estimates and recalculate all preceding interest payments. Differences between amounts owed and amounts paid by the Contractor shall be adjusted by the Contracting Officer, who shall apply a credit against the Contractor's next payment due or notify the Contractor of the additional amount due, as the case may be. All such adjustments shall include interest at the rate of 3.342 percent per annum (compounded annually). Any additional payments required from the Contractor shall be made within 12 months of the Contractor's receipt of a statement from the Contracting Officer therefor. The Contractor may use the repayment reserve fund under Subarticle 10.3(b) hereof for any payment to the United States required as a result of the above adjustment.

(e) The Contracting Officer will notify the Contractor of (i) its estimated repayment obligation when construction of the first construction stage is substantially complete and upon completion of each subsequent construction stage, and (ii) the actual repayment obligation when the final construction stage has been completed, as determined by the Contracting Officer. In the event that the project ultimately consists only of the water supply system, New Waddell Dam, and Modified Roosevelt Dam, the Contractor's actual repayment obligation shall be limited to $2.0 billion. If prior to completion of construction of such features the Contracting Officer determines that the Contractor's repayment obligation for such features will exceed $2.0 billion, the Contracting Officer shall consult with the Contractor and continuation of

construction will be contingent upon the execution of an amendatory contract to cover the increased repayment obligation. If construction of any other construction stage will result in an increase in the Contractor's repayment obligation by an amount equal to or less than the respective amount identified in Exhibit "B," which is attached hereto and made part of this contract, the Contractor's repayment ceiling may, after consultation with the Contractor, be increased by the Contracting Officer by an amount equal to or less than the respective amount identified in Exhibit "B" by written notice thereof from the Contracting Officer to the Contractor. If construction of such other construction stage will result in an increase in the Contractor's repayment obligation by an amount greater than the respective amount identified in Exhibit "B," the Contracting Officer shall consult with the Contractor and the Contractor and the Contracting Officer shall agree upon one of the following courses of action prior to initiation of construction of such construction stage: (1) that additional repayment ceiling be made available from other construction stages, in which event the Contractor's repayment ceiling will be increased to the agreed-to amount by written notice from the Contracting Officer to the Contractor; or (2) that this contract be renegotiated to increase the Contractor's repayment ceiling; *Provided*, That these courses of action shall also apply in the event that, prior to completion of construction of such stage, the Contracting Officer determines that the construction of such stage will result in an increase in the Contractor's repayment obligation by an amount greater than the respective amount identified in Exhibit "B."

(f) Annual percentages of the repayment obligation for each construction stage shall be those set

out in the following schedule or any revision thereof mutually agreed upon:

Repayment Year	Percent of Repayment Obligation (Annual)
1-7	1.0
8-14	1.3
15-21	1.6
22-28	2.0
29-35	2.6
36-42	2.7
43-49	2.7
50	2.7

(g) In the event that the Secretary contracts for delivery of non-project water under the provisions of Article 10.1, capital charges associated with such delivery shall be calculated, charged, and utilized in the same manner as capital charges deposited in the Development Fund pursuant to Article 8.18.

9.4 Payment of Contractor's Construction Cost Repayment.

(a) The Contractor shall make annual payments to the United States, to be credited to the Development Fund, which shall be sufficient, when combined with accruals from the other sources described in Section 403(f) of the Basin Project Act, the Hoover Power Plant Act of 1984, and other miscellaneous revenues, including but not limited to net wheeling charges, to effect repayment of the repayment obligation for each construction stage within a period of not more than 50 years beginning with the year following substantial completion of each construction stage. The Contractor's first payment shall be due on or before January 15 of the year following the year in which the Secretary announces the substantial

completion of each construction stage. Annual payments thereafter shall be due on or before January 15 of each following year.

(b) The Contractor agrees to make annual payments calculated by the Secretary as follows:

(i) Calculate the annual principal payments required by the schedule in Subarticle 9.3(f) or any revision thereof for each construction stage.

(ii) Add to (i) the annual interest, at 3.342 percent, on the unpaid balance of the interest-bearing allocation for each construction stage.

(iii) Determine the total amount of all interest and principal payments due for all construction stages.

(iv) Subtract therefrom the revenues estimated to be available from the Development Fund anticipating a zero balance at the end of each year in the Development Fund.

(v) Make adjustments for differences between estimated and actual revenues for the preceding year.

(c) On or before each December 15, beginning with December 15 of the year in which the Secretary notifies the Contractor of the substantial completion of the first construction stage, the Secretary will notify the Contractor of the amount of the annual payment due on the following January 15, which has been determined by the Secretary on the basis of the aforesaid calculation.

(d) The Contractor may make additional payments on the repayment obligation at any time subject to such terms and conditions as may be agreed upon by the Contractor and the Contracting Officer; *Provided, however*, That all interest due is paid at the same time, whereupon appropriate adjustments in the schedule of future payments will be made by the Secretary, who shall as promptly as possible give the Contractor written notice of the adjusted repayment schedule.

(e) It is understood and agreed that the Contractor shall be obligated for the payments set forth in Subarticle 9.4(a) hereof and that regardless of the delinquency or default in payment of any charges due to the Contractor from any subcontractor, or a diminution in the water supply available to the Contractor, or regardless of any other reason, the Contractor shall complete repayment of each construction stage within a 50-year period beginning in the year following the announcement by the Secretary of substantial completion of such construction stage.

9.5 Commercial Power Rates. The Secretary will, consistent with applicable law, periodically review and provide for appropriate adjustments in the rates established for the sales of power and energy, revenues from which contribute to the Development Fund.

9.6 Other Costs Borne by the Contractor.

(a) In addition to the payments provided for in Article 9.4 hereof, and subject to the provisions of Subarticle 9.6(d) hereof, during such periods as the United States operates and maintains completed construction stages, the Contractor shall make advance payments for

OM&R costs incurred by the United States. The United States will furnish the Contractor with an estimate in writing at least 6 months prior to substantial completion of construction of the water supply system, of the OM&R cost due from the Contractor to the end of the then current year, together with an estimate of such cost for the calendar year immediately following. Within a reasonable time of the receipt of said estimates, as determined by the Contracting Officer, the Contractor shall advance to the United States the payments for the estimated OM&R cost to the end of the then current year and without further notice or demand shall on December 15 of the then current year and on June 15 of the following year advance to the United States in equal semiannual installments the Contractor's share of the estimated cost, including supervision and administrative expense for the OM&R of the water supply system. Advance payments shall be made in subsequent years by the Contractor to the United States on the basis of estimates to be furnished by the United States on or before November 15 preceding said subsequent year and the advances of said payments shall be due and payable in equal semiannual payments on the following December 15 and June 15. Said OM&R costs are the total annual OM&R costs of completed construction stages which are allocated to the irrigation and M&I water supply functions less (i) the costs described in Subarticle 9.6(c) hereof, and (ii) an amount determined by multiplying the total of said annual costs by the ratio obtained by dividing the estimated amount of project water projected to be delivered in the subsequent year to entities other than the Contractor, the subcontractors, and those entities in New Mexico to which project water will be made available from Hooker Dam or suitable alternative, by the total

amount of project water estimated to be delivered for use in that year.

(b) Differences between actual OM&R costs and the estimated costs shall be determined by the Contracting Officer and shall be adjusted in next succeeding estimates; *Provided, however,* That if in the opinion of the Contracting Officer the amounts advanced by the Contractor for any year are likely to be insufficient to pay the above-mentioned OM&R costs during such year, additional and sufficient sums of money shall be paid forthwith by the Contractor to the United States upon notice thereof and demand therefor by the Contracting Officer; *Provided, further,* That the United States will give Contractor reasonable notice in advance of any such deficiency.

(c) The Contractor's obligation to pay said OM&R costs of completed construction stages will be reduced to the extent that project water is made available for use in New Mexico following completion of Hooker Dam or suitable alternative. Said reduction will be in the proportion which the quantity of project water projected to be delivered to water users in Arizona, in exchange for Gila River system waters delivered to water users in New Mexico from or by means of project works, bears to the total quantity of Colorado River water projected to be delivered to the project that year.

(d) In the event that responsibility for OM&R of project facilities is transferred to and assumed by the Contractor, the Contractor shall be relieved of the obligation to make OM&R payments associated with such facilities under Subarticle 9.6(a) of this contract. In that event, the United States shall pay or provide for payment

of OM&R costs associated with delivery of water to entities other than the Contractor and the subcontractors. Such costs shall be computed in accordance with Subarticle 9.6(a) of this contract. If the Contractor does not receive payment in advance for such costs, the Contractor shall have no obligation to deliver such water.

(e) During the Hoover Dam cost-repayment period, the Contractor shall pay to the United States the sum of $0.25 for each acre-foot of water pumped from Lake Havasu for miscellaneous and M&I water purposes as determined by the Contracting Officer. The quantity of water pumped for such purposes will be determined by the Contracting Officer at the end of each calendar year and the Contractor notified of the amount due by March 1 of each subsequent year. Payment shall be due on May 1 following notification. Said payment shall be credited to the Colorado River Dam Fund established by Section 2 of the Boulder Canyon Project Act.

9.7 Repayment of Costs of Excess Capacity in Granite Reef Aqueduct. The costs of providing any capacity in the Granite Reef Aqueduct and pumping plants in excess of 2,500 cubic feet per second shall be repaid by Contractor from funds available to Arizona pursuant to the provisions of Section 403(f) of the Basin Project Act, or by funds from sources other than the Development Fund.

9.8 Ad Valorem Taxes, Assessments, Tolls, and Other Charges. Within the legal limits available to it, the Contractor shall levy ad valorem taxes upon the taxable property within the service area of the Contractor at rates determined necessary by the Contractor to raise funds which, together with the revenues from the sale of water and such financial assistance from the Development Fund

as the Secretary determines is available therefor, are sufficient to meet the obligations of the Contractor to make in full all payments to the United States on or before the date such payments become due and to meet its other obligations under this contract.

9.9 Continuation of Payments After Project Payout. Following payment to the United States of the Contractor's final payment for the last construction stage, the Contractor shall continue to make annual payments to the United States to be credited to the Development Fund in amounts equal to the average annual principal payment for the project during the overall repayment period. In the event that no augmentation project, as contemplated in the Basin Project Act, has been authorized or is under active consideration by the Congress at the time project construction costs have been repaid in full, payments under this formula will be not required; *Provided, however,* That payments will commence after repayment of the project costs pursuant to the formula, or any adjustment thereof agreed to by the parties, at such time as an augmentation project is authorized by Congress and the costs thereof allocated to the Contractor are determined by the Secretary.

9.10 Defaults.

(a) The Contractor shall pay a penalty on payments, installments or charges which become delinquent, computed at the rate of 1 percent per month on the amount of such delinquent payments, installments, or charges from and after the date when the same become due until paid.

(b) No water shall be furnished to the Contractor during any period in which the Contractor may

be in arrears more than 12 months in the payments to the United States required by Article 9.4 hereof.

(c) All rights of action for breach of this contract are reserved to the United States as provided by Federal law.

10. GENERAL PROVISIONS

10.1 Other Contracts. The Secretary reserves the right to contract directly with other water using entities concerning water supply through project facilities. In the event this occurs, the provisions of Article 8.17 hereof shall be applicable.

10.2 Title to Project Works. Title to all water supply system works and all project facilities constructed pursuant to the Basin Project Act and this contract shall be and remain in the United States until otherwise provided by Congress.

10.3 Reserve Funds.

(a) (i) Commencing with notice of transfer of OM&R for the Granite Reef Aqueduct, including the Havasu Pumping Plant, the Contractor shall accumulate and maintain an emergency OM&R reserve fund, which the Contractor shall keep available to meet costs incurred during periods of interruption of water service.

(ii) The Contractor shall accumulate the reserve fund with annual deposits, including interest and dividends accruing to fund balances or holdings, of not less than $400,000 in any year in which the fund balance is less than $4,000,000. The fund shall be invested in a Federally insured interest- or dividend-bearing account, or

in securities guaranteed by the Federal Government; *Provided,* That money in the reserve fund shall be available within a reasonable time to meet expenses for such purposes as those identified in Subarticle 10.3(a)(iv) hereof. Such annual deposits and the accumulation of Interest and dividends to the reserve fund shall continue until $4,000,000 is accumulated. Interest and dividends accruing to fund balances shall be added to the fund in any year when the fund balance is greater than $4,000,000; *Provided,* That in no event shall the fund be increased to an amount greater than the actual amount of fixed OM&R costs for the preceding year as mutually determined by the Contractor and the Contracting Officer. Any balance in the fund in excess of the amount of fixed OM&R costs for the previous year shall be considered to be the general funds of the Contractor and available for use as such.

(iii) Upon mutual agreement between the Contractor and the Contracting Officer, the amount to be accumulated and maintained in the reserve fund provided for in this Subarticle may be adjusted in consideration of the risk and uncertainty stemming from the size and complexity of the project, the size of the annual OM&R budget, additions to, deletions from, or changes in project works, or OM&R costs not contemplated when this contract was executed.

(iv) The Contractor may make expenditures from such reserve fund only for meeting unforeseen and extraordinary operation and maintenance costs, unusual or extraordinary repair or replacement costs, and betterment costs (in situations where recurrence of severe operation and maintenance problems can be avoided or eliminated). Proposed expenditures from the fund shall be

submitted to the Contracting Officer in writing for review and written approval prior to disbursement.

(v) During any period in which any of the project works are operated and maintained by the United States, the reserve fund shall be available for like use by the United States.

(vi) On or before February 1 of each year, the Contractor shall provide to the Contracting Officer an annual statement indicating the principal and accumulated interest in the emergency OM&R reserve fund as of December 31 of the preceding year.

(b) (i) No later than 1 year following the Contractor's last construction advance under the Plan 6 Funding Agreement, the Contractor shall accumulate and maintain a repayment reserve fund to help assure payments to the United States under this contract.

(ii) The Contractor shall accumulate such reserve fund with annual deposits, including interest and dividends accruing to fund balances or holdings, of not less than $4,000,000 in any year in which the fund balance is less than $40,000,000. The fund shall be invested in a Federally insured interest- or dividend-bearing account, or in securities guaranteed by the Federal Government; *Provided,* That money in the reserve fund shall be available within a reasonable time to meet expenses for the purpose for which it was established. Such annual deposits and the accumulation of interest to the reserve fund shall continue until $40,000,000 is accumulated. Any balance in the fund in excess of $40,000,000 shall be considered to be the general funds of the Contractor and available for use as such.

(iii) Upon mutual agreement between the Contractor and the Contracting Officer, the amount to be accumulated and maintained in the reserve fund provided for in this Subarticle may be adjusted.

(iv) Proposed expenditures from the fund shall be submitted to the Contracting Officer in writing for review and written approval prior to disbursement.

(v) On or before February 1 of each year, the Contractor shall provide to the Contracting Officer an annual statement of the principal and accumulated interest in the repayment reserve fund as of December 31 of the preceding year.

10.4 Recreational Use of Water Facilities.

(a) The enhancement of recreational opportunities in connection with the project works authorized pursuant to Title III of the Basin Project Act shall be in accordance with the provisions of the federal Water Project Recreation Act, 79 Stat. 213, dated July 9, 1965, except as provided in Subarticle 10.4(b) hereof.

(b) Recreational development at Orme Dam and Reservoir shall be governed by the provisions of Section 302(d) of the Basin Project Act.

10.5 Confirmation of Contract.

(a) The Contractor, after the execution of this contract, shall promptly seek to secure a decree of a court of competent jurisdiction of the State of Arizona confirming the execution of this contract. The Contractor shall furnish the United States a certified copy of the final decree, the validation proceedings, and all pertinent

supporting records of the court approving and confirming this contract, and decreeing and adjudging it to be lawful, valid, and binding on the Contractor. This contract shall not be binding on the United States or the Contractor until such final decree has been entered.

(b) This contract shall be indivisible for purposes of validation and shall not be binding on the United States or the Contractor unless validated pursuant to the provisions of Subarticle 10.5(a) hereof in each and all of its terms and conditions.

10.6 Rules, Regulations, and Determinations.

(a) The parties agree that the delivery of water or the use of Federal facilities pursuant to this contract is subject to Reclamation Law, as amended and supplemented, and the rules and regulations promulgated by the Secretary of the Interior under Reclamation Law.

(b) The Contracting Officer, after an opportunity has been offered to the Contractor for consultation, shall have the right to make rules, regulations, and determinations consistent with the provisions of this contract, the laws of the United States and the State of Arizona, including, without limitation, rules, regulations, and determinations relative to maximizing project benefits from pumping from Lake Havasu, the rate and schedule of pumping therefrom and the rate and schedule of pumping at the Granite Reef pumping plants, to add to or modify said rules, regulations, and determinations as may be deemed proper and necessary to carry out this contract, and to supply necessary details of its administration which are not covered by express provisions of this contract. The Contractor and each subcontractor shall observe such

rules, regulations, and determinations and each subcontract shall so provide.

(c) Where the terms of this contract provide for action to be based upon the opinion or determination of either party to this contract, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations. In the event that the Contractor questions any factual determination made by the Contracting Officer, the findings as to the facts shall be made by the Secretary only after consultation with the Contractor and shall be conclusive upon the parties.

10.7 Books, Records, and Reports. The Contractor shall establish and maintain accounts and other books and records pertaining to administration of the terms and conditions of this contract, including: the Contractor's financial transactions, water supply data, project operation, maintenance and replacement logs, project land and right-of-way use agreements, and other matters specifically relating to this contract that the Contracting Officer may require. Reports thereon shall be furnished to the Contracting Officer in such form and on such date or dates as the Contracting Officer may require. Subject to applicable Federal laws and regulations, each party to this contract shall have the right during office hours to examine and make copies of the other party's books and records relating to matters covered by this contract.

10.8 Notices. Any notice, demand, or request authorized or required by this contract shall be deemed to have been given, on behalf of the Contractor, when mailed, postage prepaid, or delivered to the Regional Director,

Lower Colorado Region, Bureau of Reclamation, P.O. Box 61470, Boulder City, Nevada 89006, and on behalf of the United States, when mailed, postage prepaid, or delivered to the General Manager of the Contractor, 23636 North 7th Street, Phoenix, Arizona 85024. The designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

10.9 Contingent on Appropriation or Allotment of Funds. The expenditure or advance of any money or the performance of any obligation by the United States under this contract shall be contingent upon appropriation or allotment of funds. Absence of appropriation or allotment of funds shall not relieve the Contractor from any obligations under this contract. No liability shall accrue to the United States in case funds are not appropriated or allotted.

10.10 Changes in Contractor's Organization. While this contract is in effect, no change shall be made in the Contractor's organization, by exclusion of lands, by dissolution, consolidation, merger or otherwise, except upon the Contracting Officer's written consent; *Provided, however,* That approval is hereby given to the inclusion of other counties as part of Contractor's service area, except, however, that the United States shall not be required, under this contract, to construct project facilities to serve lands within said additional counties.

10.11 Assignment Limited-Successors and Assigns Obligated. The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this contract or any part

or interest therein shall be valid until approved in writing by the Contracting Officer.

10.12 Judicial Remedies Not Foreclosed. Nothing herein shall be construed (a) as depriving either party from pursuing and prosecuting any remedy in any appropriate court of the United States or the State of Arizona which would otherwise be available to such parties even though provisions herein may declare that determinations or decisions of the Secretary or other persons are conclusive or (b) as depriving either party of any defense thereto which would otherwise be available.

10.13 Equal Opportunity. During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Equal Opportunity clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will

receive consideration for employment without regard to race, color, religion, sex, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Contracting Officer, advising the labor union or workers' representative of the Contractor's commitments under this Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Contractor shall furnish all information and reports required by said amended Executive Order and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the Contracting Officer and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended, in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in said amended Executive Order, and such other sanctions may be imposed and remedies invoked as provided in said amended Executive

Order, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of said amended Executive Order, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the Contracting Officer may direct as a means of enforcing such provisions, including sanctions for noncompliance; *Provided, however,* That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Contracting Officer, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

10.14 Compliance With Civil Rights Laws and Regulations.

(a) The Contractor shall comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), Section 504 of the Rehabilitation Act of 1975 (Public Law 93-112, as amended), the Age Discrimination Act of 1975 (42 U.S.C. 6101, *et seq.*) and any other applicable civil rights laws, as well as with their respective implementing regulations and guidelines imposed by the U.S. Department of the Interior and/or Bureau of Reclamation.

(b) These statutes require that no person in the United States shall, on the grounds of race, color, national origin, handicap, or age, be excluded from participation in, be denied the benefits of, or be otherwise

subjected to discrimination under any program or activity receiving financial assistance from the Bureau of Reclamation. By executing this contract, the Contractor agrees to immediately take any measures necessary to implement this obligation, including permitting officials of the United States to inspect premises, programs, and documents.

(c) The Contractor makes this agreement in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property discounts or other Federal financial assistance extended after the date hereof to the Contractor by the Bureau of Reclamation, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The Contractor recognizes and agrees that such Federal assistance will be extended in reliance on the representations and agreements made in this article, and that the United States reserves the right to seek judicial enforcement thereof.

10.15 Officials Not to Benefit. No Member of or Delegate to Congress, Resident Commissioner or official of the Contractor shall benefit from this contract other than as a water user or landowner in the same manner as other water users or landowners.

11. STATUS OF DECEMBER 15, 1972 CONTRACT

Upon judicial confirmation of this contract, the December 15, 1972 contract entitled "Contract Between the United States and the Central Arizona Water Conservation District For Delivery of Water and Repayment of Costs of the Central Arizona Project" (Contract No. 14-06-W-245), shall be superseded and replaced by this contract.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA

By /s/ [Illegible]
Assistant Secretary – Water and
Science Department of the Interior

CENTRAL ARIZONA
CONSERVATION DISTRICT

ATTEST:

/s/ Marilyn H. Ronstadt
Secretary

By /s/ Rod J. McMullen
President

Subcontract No. 4-07-30-W0045

CAWCD Revised 11/83

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

SUBCONTRACT AMONG THE UNITED STATES, THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT, AND THE Central Arizona Irrigation and Drainage District
PROVIDING FOR WATER SERVICE

CENTRAL ARIZONA PROJECT

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Subcontract No. 4-07-30-W0045

CAWCD Revised 11-83

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

SUBCONTRACT AMONG THE UNITED STATES
THE CENTRAL ARIZONA WATER
CONSERVATION DISTRICT, AND THE
Central Arizona Irrigation and Drainage District
PROVIDING FOR WATER SERVICE
CENTRAL ARIZONA PROJECT

1. PREAMBLE:

THIS SUBCONTRACT, made this 21st day of November, 1983, in pursuance generally of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, including but not limited to the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057), as amended, the Reclamation Project Act of August 4, 1939 (53 Stat. 1187), as amended, the Reclamation Reform Act of October 12, 1982 (96 Stat. 1263), and particularly the Colorado River Basin Project Act of September 30, 1968 (82 Stat. 885), as amended, all collectively hereinafter referred to as the "Federal Reclamation Laws," among the UNITED STATES OF AMERICA, hereinafter referred to as the "United States" acting through the Secretary of the Interior, the CENTRAL ARIZONA WATER

CONSERVATION DISTRICT, hereinafter referred to as the "Contractor," a water conservation district organized under the laws of Arizona, with its principal place of business in Phoenix, Arizona, and the Central Arizona Irrigation and Drainage District, hereinafter referred to as the "Subcontractor," with its principal place of business in Eloy, Arizona;

WITNESSETH, THAT:

2. EXPLANATORY RECITALS:

WHEREAS, the Colorado River Basin Project Act provides, among other things, that for the purposes of furnishing irrigation and municipal and industrial water supplies to water deficient areas of Arizona and western New Mexico through direct diversion or exchange of water, control of floods, conservation and development of fish and wildlife resources, enhancement of recreation opportunities, and for other purposes, the Secretary of the Interior shall construct, operate, and maintain the Central Arizona Project; and

WHEREAS, pursuant to the provisions of Arizona Revised Statutes § 45-2601 et seq., the Contractor has been organized with the power to enter into a contract or contracts with the Secretary of the Interior to accomplish the purposes of Arizona Revised Statutes, § 45-2601 et seq.: and

WHEREAS, pursuant to Section 304(b)(1) of the Colorado River Basin Project Act, the Secretary of the Interior has determined that it is necessary to effect repayment of the cost of constructing the Central Arizona Project pursuant to a master contract and that the United

States, together with the Contractor, shall be a party to contracts that are in conformity with and subsidiary to the master contract; and

WHEREAS, the United States and the Contractor entered into Contract No. 14-06-W-245 dated December 15, 1972, hereinafter referred to as the "Repayment Contract," a copy of which is attached hereto as Exhibit "A" and by this reference made a part hereof, whereby the Contractor agrees to repay to the United States the reimbursable costs of the Central Arizona Project allocated to the Contractor; and

WHEREAS, the subcontractor is in need of a water supply and desires to subcontract with the United States and the Contractor for water service from water supplies available under the Central Arizona Project; and

WHEREAS, upon completion of the Central Arizona Project, water shall be available for delivery to the Subcontactor;

NOW THEREFORE, in consideration of the mutual and dependent covenants herein contained, it is agreed as follows:

3. DEFINITIONS:

Definitions included in the Repayment Contract are applicable to this subcontract; *Provided, however*, That the terms "Agricultural water" or "Irrigation water" shall mean water used for the purposes defined in the Repayment Contract on tracts of land operated in units of more than 5 acres. The first letters of terms so defined are capitalized herein. As heretofore indicated, a copy of the Repayment Contract is attached as Exhibit "A."

4. DELIVERY OF WATER:

4.1 Obligations of the United States. Subject to the terms, conditions, and provisions set forth herein and in the Repayment Contract, during such periods as it operates and maintains the Project Works, the United States shall deliver Project Water for Agricultural use by the Subcontractor. The United States shall use all reasonable diligence to make available to the Subcontractor the quantity of Project Water specified in the schedule submitted by the Subcontractor in accordance with Article 4.4. After transfer of OM&R to the Operating Agency, the United States shall make deliveries of Project Water to the Operating Agency which shall make subsequent delivery to the Subcontractor as provided herein.

4.2 Term of Subcontract. This subcontract shall become effective upon its confirmation as provided for in Article 6.12 and shall remain in effect for a period of 50 years beginning with the January 1 of the Year following that in which the Secretary issues the Notice of Completion of the Water Supply System; *Provided*, That this subcontract may be renewed upon written request by the Subcontractor upon terms and conditions of renewal to be agreed upon not later than 1 year prior to the expiration of this subcontract; *And Provided further*, That such terms and conditions shall be consistent with Article 9.9 of the Repayment Contract.

4.3 Conditions Relating to Delivery and Use. Delivery and use of water under this subcontract is conditioned on the following, and the Subcontractor hereby agrees that:

(a) All uses of Project Water and Return Flow shall be consistent with Arizona water law unless such law

is inconsistent with the Congressional directives applicable to the Central Arizona Project.

(b) The system or systems through which water for Agricultural, M&I and Miscellaneous (including ground-water recharge) purposes is conveyed after delivery to the Subcontactor shall consist of pipelines, canals, distribution systems, or other conduits provided and maintained with linings adequate in the Contracting Officer's judgment to prevent excessive conveyance losses.

(c) The Subcontractor shall not pump, or within its legal authority, permit others to pump ground water from within the exterior boundaries of the Subcontractor's service area, which has been delineated on a map filed with the Contractor and approved by the Contractor and the Contracting Officer, for use outside of said service area unless such pumping is permitted under Title 45, Chapter 2, Arizona Revised Statutes, as it may be amended from time to time, and the Contracting Officer, the Contractor, and the Subcontractor shall agree, or shall have previously agreed, that a surplus of ground water exists and drainage is or was required; *Provided, however*, That such pumping may be approved by the Contracting Officer and the Contractor, and approval shall not be unreasonably withheld, if such pumping is in accord with the Basin Project Act and upon submittal by the Subcontractor of a written certification from the Arizona Department of Water Resources or its successor agency that the pumping and transportation of ground water is in accord with Title 45, Chapter 2, Arizona Revised Statutes, as it may be amended from time to time.

(d) The Subcontractor shall not sell or otherwise dispose of or permit the sale or other disposition of my

Project Water for use outside of Maricopa, Pinal and Pima Counties; *Provided*, *however*, That this does not prohibit exchanges of Project Water covered by separate agreements.

(e)(i) Project Water scheduled for delivery in any Year under this subcontract may be used by the Subcontractor or resold or exchanged by the Subcontractor pursuant to appropriate agreements approved by the Contracting Officer and the Contractor. If said water is resold or exchanged by the Subcontractor for an amount in excess of that which the Subcontractor is obligated to pay under this Subcontract, the excess amount shall be paid forthwith by the Subcontractor to the Contractor for application against the Contractor's Repayment Obligation to the United States; *Provided*, *however*, That the Subcontractor shall be entitled to recover actual costs of transportation, treatment, and distribution, including but not limited to capital costs and OM&R costs.

(ii) Project Water scheduled for delivery in any year under this subcontract that cannot be used, resold, or exchanged by the Subcontractor may be made available by the Contracting Officer and Contractor to other users. If such Project Water is sold to or exchanged with other users, the Subcontractor shall be relieved of its payments hereunder only to the extent of the amount paid to the Contractor by such other users, but not to exceed the amount the Subcontractor is obligated to pay under this subcontract for said water.

(iii) In the event the Subcontractor or the Contracting Officer and the Contractor are unable to sell any portion of the Subcontractor's Project Water scheduled for delivery and not required by the Subcontractor, the

Subcontractor shall be relieved of the pumping energy portion of the OM&R charges associated with the undelivered water as determined by the Contractor.

(f) Unless and until otherwise provided by Congress, Project Water shall not be made available directly or indirectly for the irrigation of lands in the Subcontractor's service area which the Secretary determines were not irrigated during the period September 30, 1958, to September 30, 1968, except where otherwise determined by the Secretary for efficiency of the Subcontractor's operation.

(g) Agricultural Water shall be made available only for the irrigation of eligible lands. "Eligible lands" shall mean those lands which were irrigated during the period of September 30, 1958, to September 30, 1968, and meet all other Federal requirements and which may legally be irrigated pursuant to Title 45, Chapter 2, Arizona Revised Statutes, as it may be amended from time to time. Said eligible lands are shown on the map which is attached hereto as Exhibit "B" and by this reference made a part hereof.

(h) Agricultural Water shall not be made available to the Subcontractor until there are in effect measures which are adequate in the judgment of the Contracting Officer and the Contractor to control expansion of irrigation from aquifers affected by irrigation in the Subcontractor's service area and to reduce pumping of ground water in the Subcontractor's service area by the amount of Project Agricultural Water received.

(i) Subject to the prior approval of the Contracting Officer and the Contractor, which approval shall not be unreasonably withheld, Agricultural Water made available

hereunder for eligible lands may be converted to M&I purposes if and to the extent that such water is no longer required by the Subcontractor for irrigation purposes and shall be converted in all cases where eligible lands receiving Project Agricultural Water have been converted to M&I use; *Provided*, That the water converted from irrigation to M&I purposes as a result of the conversion of eligible lands to M&I uses shall be used only for M&I purposes within the service area of the entity responsible for serving the converted lands. Such conversion of water use for eligible lands shall be at the rate of 1 acre-foot per acre minus the average annual surface water supply for said acre which was available for use during the 1958-1976 period as determined by the Contracting Officer. Conversion of water from agricultural to M&I purposes shall take effect only upon execution or amendment of an appropriate subcontract among the United States, the Contractor, and the M&I user. All Project Water converted from agricultural to M&I use shall be delivered at the same water service charge per acre-foot as other M&I Water and with the same priority as other Project M&I Water; *Provided*, That the Contractor's charge to the Subcontractor for water service shall be adjusted to reflect the conversion to M&I uses.

4.4 Procedure for Ordering Water.

(a) At least 15 months prior to the date the Secretary expects to issue the Notice of Completion of the Water Supply System, or as soon thereafter as is practicable, the Contracting Officer shall announce by written notice to the Contractor the amount of Project Water available for delivery during the Year in which said Notice of Completion is issued (initial Year of water delivery) and

during the following Year. Within 30 days of receiving such notice, the Contractor shall issue a notice of availability of Project Water to the Subcontractor. The Subcontractor shall, within a reasonable period of time as determined by the Contractor, submit a written schedule to the Contractor and the Contracting Officer showing the quantity of water desired by the Subcontractor during each month of said initial Year and the following Year. The Contractor shall notify the Subcontractor by written notice of the Contractor's action on the requested schedule within 2 months of the date of receipt of such request.

(b) The amounts, times, and rates of delivery of Project Water to the Subcontractor during each Year subsequent to the Year following said initial Year of water delivery shall be in accordance with a water delivery schedule for that Year. Such schedule shall be determined in the following manner:

(i) On or before June 1 of each Year beginning with the Year following the initial Year of water delivery pursuant to this subcontract, the Contracting Officer shall announce the amount of Project Water available for delivery during the following Year in a written notice to the Contractor. In arriving at this determination, the Contracting Officer, subject to the provisions of the Repayment Contract, shall use his best efforts to maximize the availability and delivery of Arizona's full entitlement of Colorado River water over the term of this subcontract. Within 30 days of receiving said notice, the Contractor shall issue a notice of availability of Project Water to the Subcontractor.

(ii) On or before October 1 of each Year beginning with the Year following said initial Year of water

delivery, the Subcontractor shall submit in writing to the Contractor and the Contracting Officer a water delivery schedule indicating the amounts of Project Water desired by the Subcontractor during each month of the following Year along with preliminary estimate of Project Water desired for the succeeding 2 years.

(iii) Upon receipt of the schedule, the Contractor and the Contracting Officer shall review it and, after consultation with the Subcontractor, shall make only such modifications to the schedule as are necessary to ensure that the amounts, times, and rates of delivery to the Subcontractor are consistent with the delivery capability of the Project, considering, among other things, the availability of water and the delivery schedules of all subcontractors.

(iv) On or before November 15 of each Year beginning with the Year following said initial Year of water delivery, the Contractor shall determine and furnish to the Subcontractor and the Contracting Officer the water delivery schedule for the following Year which shall show the amount of water to be delivered to the Subcontractor during each month of that Year, contingent upon the Subcontractor remaining eligible to receive water under all terms contained herein.

(c) The monthly water delivery schedules may be amended upon the Subcontractor's written request to the Contractor. Proposed amendments shall be submitted by the Subcontractor to the Contractor no later than 15 days before the desired change is to become effective, and shall be subject to review and modification in like manner as the schedule. The Contractor shall notify the Subcontractor and the Contracting Officer of its action on the

Subcontractor's requested schedule modification within 10 days of the Contractor's receipt of such request.

(d) The Contractor and the Subcontractor shall hold the United States, its officers, agents, and employees, harmless on account of damage or claim of damage of any nature whatsoever arising out of or connected with the actions of the Contractor regarding water delivery schedules furnished to the Subcontractor.

(e) In no event shall the Contracting Officer or the Contractor be required to deliver to the Subcontractor from the Water Supply System in any one month a total amount of Project Water greater than 11 percent of the Subcontractor's annual entitlement for that Year; *Provided, however*, That the Contracting Officer may deliver a greater percentage in any month if such increased delivery is compatible with the overall delivery of Project Water to other subcontractors as determined by the Contracting Officer and the Contractor and if the Subcontractor agrees to accept such increased deliveries.

4.5 Points of Delivery – Measurement and Responsibility for Distribution of Water.

(a) The water to be furnished to the Subcontractor pursuant to this subcontract shall be delivered at turnouts to be constructed by the United States at such point(s) on the Water Supply System as may be agreed upon in writing by the Contracting Officer and the Contractor, after consultation with the Subcontractor.

(b) Unless the United States and the Subcontractor agree by contract to the contrary, the Subcontractor shall construct and install, at its sole cost and expense,

connection facilities required to take and convey the water from the turnouts to the Subcontractor's service area. The Subcontractor shall furnish, for approval of the Contracting Officer, drawings showing the construction to be performed by the Subcontractor within the Water Supply System right-of-way 6 months before starting said construction. The facilities may be installed, operated, and maintained on the Water Supply System right-of-way subject to such reasonable restrictions and regulations as to type, location, method of installation, operation and maintenance as may be prescribed by the Contracting Officer.

(c) All water delivered from the Water Supply System shall be measured with equipment furnished and installed by the United States and operated and maintained by the United States or the Operating Agency. Upon the request of the Subcontractor or the Contractor, the accuracy of such measurements shall be investigated by the Contracting Officer or the Operating Agency, Contractor, and Subcontractor, and any errors which may be mutually determined to have occurred therein shall be adjusted; *Provided*, That in the event the parties cannot agree on the required adjustment, the Contracting Officer's determination shall be conclusive.

(d) Neither the United States, the Contractor, nor the Operating Agency shall be responsible for the control, carriage, handling, use, disposal, or distribution of Project Water beyond the delivery point(s) agreed to pursuant to Subarticle 4.5 (a). The Subcontractor shall hold the United States, the Contractor, and the Operating Agency harmless on account of damage or claim of damage of any nature whatsoever for which there is legal responsibility, including property damage, personal injury or death

arising out of or connected with the Subcontractor's control, carriage, handling, use, disposal, or distribution of such water beyond said delivery point(s).

4.6 Temporary Reductions. In addition to the right of the United States under Subarticle 8.3(a)(iv) of the Repayment Contract temporarily to discontinue or reduce the amount of water to be delivered, the United States or the Operating Agency may, after consultation with the Contractor, temporarily discontinue or reduce the quantity of water to be furnished to the Subcontractor as herein provided for the purposes of investigation, inspection, maintenance, repair, or replacement of any of the Project facilities or any part thereof necessary for the furnishing of water to the Subcontractor, but so far as feasible the United States or the Operating Agency shall coordinate any such discontinuance or reduction with the Subcontractor and shall give the Subcontractor due notice in advance of such temporary discontinuance or reduction, except in case of emergency, in which case no notice need be given. Neither the United States, its officers, agents, and employees, nor the Operating Agency, its officers, agents, and employees, shall be liable for damages when, for any reason whatsoever, any such temporary discontinuance or reduction in delivery of water occurs. If any such discontinuance or temporary reduction results in deliveries to the Subcontractor of less water than what has been paid for in advance, the Subcontractor shall be entitled to be reimbursed for the appropriate proportion of such advance payments prior to the date of the Subcontractor's next payment of water service charges or the Subcontractor may be given credit toward the next payment of water charges if the Subcontractor should so desire.

4.7 Priority in Case of Shortage. Subject to the provisions of Section 304(e) of the Basin Project Act, any Project Water furnished for non-Indians through Project facilities shall, in the event of shortage thereof, as determined by the Contracting Officer after consultation with the Contractor, be reduced pro rata until exhausted, first for Miscellaneous Water uses and next for Agricultural Water uses before water furnished for non-Indian M&I use is reduced. Thereafter, water for M&I uses shall be reduced pro rata among all non-Indian M&I users. All Project Water converted from agricultural to M&I use shall be delivered with the same priority as other Project M&I Water. Pursuant to the authority vested in the Secretary by the Reclamation Act of 1902 (32 Stat. 388), as amended and supplemented, the Basin Project Act, the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1505), and the Implementing Procedures of the U. S. Department of the Interior (516 DM 5.4), the relative priorities between Indian and non-Indian uses will be determined by the Secretary consistent with the allocations published in the *Federal Register* on March 24, 1983.

4.8 Secretarial Control of Return Flow.

(a) The Secretary reserves the right to capture all Return Flow flowing from the exterior boundaries of the Contractor's Service Area as a source of supply and for distribution to and use of the Central Arizona Project to the fullest extent practicable. The Secretary also reserves the right to capture for Project use Return Flow which originates or results from water contracted for from the Central Arizona Project within the boundaries of the Contractor's Service Area if, in his judgment, such Return

Flow is not being put to a beneficial use. The Subcontractor may recapture and reuse or sell its Return Flow; *Provided, however,* That such Return Flow may not be sold for use outside Maricopa, Pinal and Pima Counties. The Subcontractor shall, at least 60 days in advance of any proposed sale of such water, furnish the following information in writing to the Contracting Officer and the Contractor:

(i) The name and address of the prospective buyer.

(ii) The location and proposed use of the Return Flow.

(iii) The price to be charged for the Return Flow.

(b) The price charged for the Return Flow may cover the cost incurred by the Subcontractor for Project Water plus the cost required to make the Return Flow usable. If the price received for the Return Flow is greater than the costs incurred by the Subcontractor, as described above, the excess amount shall be forthwith returned by the Subcontractor to the Contractor for application against the Contractor's Repayment Obligation to the United States. Costs required to make Return Flow usable shall include but not be limited to capital costs and OM&R costs including transportation, treatment and distribution, and the portion thereof which may be retained by the Subcontractor shall be subject to the advance approval of the Contractor and the Contracting Officer.

(c) Any Return Flow captured by the United States and determined by the Contracting Officer and the Contractor to be suitable and available for use by the Subcontractor may be delivered by the United States or

Operating Agency to the Subcontractor as a part of water supply for which the Subcontractor subcontracts hereunder and such water shall be accounted and paid for pursuant to the provisions hereof.

(d) All capture, recapture, use, reuse and sale of Return Flow under this article shall be in accord with Arizona water law.

4.9 Water Acquired by Subcontractor Other Than From the United States.

(a) The provisions of Subarticles 6.4(a) and (b) of this subcontract shall not be applicable to or affect non-Project Water or water rights now owned or hereafter acquired by the Subcontractor from sources other than from the United States unless such non-Project Water is transported through distribution facilities of the Subcontractor constructed or financed by the United States. If Project and non-Project Waters are commingled, Subarticles 6.4(a) and (b) of this subcontract shall apply as follows:

(i) If Project and non-Project Waters are transported through non-Federally financed distribution facilities, only Project Water is subject to Subarticles 6.4(a) and (b) of this subcontract.

(ii) If Project and non-Project Waters are transported through Federally financed distribution facilities, both Project and non-Project Waters are subject to Subarticles 6.5(a) and (b) of this subcontract.

(b) With respect to the distribution facilities or portions thereof in which commingling occurs as provided in subarticle (a)(i) hereof, the Subcontractor:

(i) Shall install and be responsible for the OM&R of separate outlets from the distribution facilities for nonexcess and excess lands. At the request of the Contracting Officer, the Subcontractor shall be responsible for the installation and OM&R of water measuring equipment at delivery points to excess lands and, further, shall be responsible for the installation and OM&R of similar equipment for measuring the water available to the Subcontractor other than from the Central Arizona Project, and the Contracting Officer may check and inspect said equipment at any time; and

(ii) Agrees that the quantity of Project Water furnished to it shall be delivered only to eligible lands through the aforesaid outlets. The Subcontractor shall be deemed to be in breach of this Article and Subarticles 6.4(a) and (b) of this subcontract if at any time there is furnished to any excess lands not covered by recordable contracts and served by the distribution facilities, or portions thereof in which commingling occurs, a quantity of water which is greater than that which the Subcontractor has introduced into said system from the supply available other than pursuant to this subcontract.

(c) Should breach of this Article and Subarticles 6.4(a) and (b) be determined by the Contracting Officer, there shall be no further delivery of Project Water to the Subcontractor until the Subcontractor is in compliance with such provisions as determined by the Contracting Officer. In the event that delivery of Project Water is denied to the Subcontractor due to non-compliance the provisions of Subarticle 4.3 (e) shall apply.

4.10 Water and Air Pollution Control. The Subcontractor, in carrying out this subcontract, shall comply with

all applicable water and air pollution laws and regulations of the United States and the State of Arizona and shall obtain all required permits or licenses from the appropriate Federal, State, or local authorities.

4.11 Quality of Water. The operation and maintenance of Project facilities shall be performed in such manner as is practicable to maintain the quality of water made available through such facilities at the highest level reasonably attainable as determined by the Contracting Officer. Neither the United States, the Contractor, nor the Operating Agency warrants the quality of water and is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water. The Subcontractor waives its right to make a claim against the United States, the Operating Agency, the Contractor or another Subcontractor because of changes in water quality caused by the comingling of Project water with other water.

4.12 Exchange Water.

(a) Where the Contracting Officer determines the Subcontractor is physically able to receive Colorado River mainstream water in exchange for or in replacement of existing supplies of water from surface sources other than the Colorado River, the Contracting Officer may require that the Subcontractor accept said mainstream water in exchange for or in replacement of said existing supplies pursuant to the provisions of Section 304(d) of the Basin Project Act: *Provided, however,* That a subcontractor on the Project aqueduct shall not be required to enter into exchanges in which existing supplies of water from surface

sources are diverted for use by other Subcontractors downstream on the Project aqueduct.

(b) If, in the event of shortages, the Subcontractor has yielded water from other surface water sources in exchange for Colorado River mainstream water supplied by the Contractor or the Operating Agency, the Subcontractor shall have first priority against other users supplied with Project Water that have not yielded water from other surface water sources but only in quantities adequate to replace the water so yielded.

4.13 Entitlement to Project Agricultural Water.

(a) Commencing with the Year in which the Secretary issues the Notice of Completion of the Water Supply System and for each Year thereafter until the term of this subcontract expires, the Subcontractor's entitlement to Agricultural Water each Year shall be equal to *18.01* percent of the total supply of Agricultural Water available for delivery from the Project in the same Year; minus the amount of Project Agricultural Water that would have been delivered to eligible lands in the Subcontractor's service area that have been converted to M&I use or have otherwise been removed from irrigation as determined by the Contracting Officer and calculated on the basis of a uniform delivery amount per acre to all eligible lands in the Subcontractor's service area at the time of execution of this subcontract; plus *18.01* percent of the sum of deductions made in all subcontractors' entitlements to reflect removal of eligible lands from agricultural use; *Provided, however,* That after consultation with the Subcontractor, the Contracting Officer may, from time to time, adjust said percent of the sum of deductions as he

determines necessary to more accurately reflect the Subcontractor's equitable share of such water.

(b) After consultation with the Arizona Department of Water Resources, the Secretary shall reallocate for non-Indian agricultural use all entitlements to Agricultural Water that were not contracted for by the entities to which such entitlements were first made available. In the event the Secretary allocates an additional Agricultural Water entitlement to the Subcontractor, the Subcontractor's entitlement specified in Subarticle 4.13(a) shall be adjusted by written notice from the Contracting Officer to the Subcontractor and the Contractor.

4.14 Delivery of Project Water Prior to Completion of Project Works. Prior to the date of issuance of the Notice of Completion of the Water Supply System by the Secretary, water may be made available for delivery by the Secretary on a "when available" basis at a water rate and other terms to be determined by the Secretary after consultation with the Contractor.

5. PAYMENTS:

5.1 Water Service Charges for Payment of Operation, Maintenance, and Replacement Costs. Subject to the provisions of Article 5.4 hereof, the Subcontractor shall pay in advance for Project OM&R costs estimated to be incurred by the United States or the Operating Agency. At least 15 months prior to first delivery of Project Water, or as soon thereafter as is practicable, the Contractor shall furnish the Subcontractor with an estimate of the Subcontractor's share of OM&R costs to the end of the initial Year of water delivery and an estimate of such costs for the following Year. Within a reasonable time of the receipt of

said estimates, as determined by the Contractor, but prior to the delivery of water, the Subcontractor shall advance to the Contractor its share of such estimated costs to the end of the initial month of water delivery and without further notice or demand shall on or before the first day of each succeeding month of the initial Year of water delivery and the following Year advance to the Contractor in equal monthly installments the Subcontractor's share of such estimated costs. Advances of monthly payments for each subsequent Year shall be made by the Subcontractor to the Contractor on the basis of annual estimates to be furnished by the Contractor on or before June 1 preceding each said subsequent Year and the advances of payments for said estimated costs shall be due and payable in equal monthly payments on or before the first day of each month of the subsequent Year. Differences between actual OM&R costs and estimated OM&R costs shall be determined by the Contractor and shall be adjusted in the next succeeding annual estimates; *Provided, however,* That if in the opinion of the Contractor the amount of any annual OM&R estimate is likely to be insufficient to cover the above-mentioned costs during such period, the Contractor may increase the annual estimate of the Subcontractor's OM&R costs by written notice thereof to the Subcontractor, and the Subcontractor shall forthwith increase its remaining monthly payments in such Year to the Contractor by the amount necessary to cover the insufficiency. All estimates of OM&R costs shall be accompanied by data and computations relied on by the Contractor in determining the amounts of the estimated OM&R costs and shall be subject to joint review by the Subcontractor and the Contractor.

5.2 Agricultural Water Service Charges.

(a) Subject to the provisions of Article 5.4 hereof and in addition to the OM&R payments required in Article 5.1 hereof, the Subcontractor shall, in advance of the delivery of Project Agricultural Water by the United States for the Operating Agency, make payments to the Contractor in equal semiannual installments of an Agricultural Water service capital charge of *$2.00* for each acre-foot of Agricultural Water scheduled for delivery to the Subcontractor pursuant to the provisions of Articles 4.4 and 4.13 hereof. The Agricultural Water service capital charge payment for the quantity of water available for the Subcontractor for the balance of the initial Year of water delivery shall be advanced to the Contractor prior to commencement of delivery of water. Thereafter, for each subsequent Year, payments by the Subcontractor shall be made in equal semiannual installments on or before the December 1 preceding said subsequent Year and the June 1 of said subsequent Year as may be specified by the Contractor in written notices to the Subcontractor.

(b) The Agricultural Water service capital charge may be adjusted periodically to reflect changes in repayment ability as determined by the Contracting Officer after consultation with the Contractor and Subcontractor. Any changes in the capital charge shall be announced by the Contractor on or before June 1 of the Year preceding the Year in which payable.

(c) On or before the first anniversary of execution of this subcontract and on or before each succeeding anniversary, until Notice of Completion of the Water Supply System is issued, the Subcontractor shall pay, in addition to all other payments required herein, an agricultural subcontract charge which shall be equal to the amount

obtained by multiplying the percentage in Subarticle 4.13(a) by $500,000. Prior to the date of issuance of the Notice of Completion of the, Water Supply System, the subcontract charge shall be paid each Year by the Subcontractor to the United States. The Contracting Officer shall advise the Contractor of the amounts and dates of the Subcontractor's payments.

(d) Funds advanced to the United States by the Subcontractor pursuant to Subarticle 5.2(c) as a subcontracting charge shall be credited by the Contractor against the Subcontractor's initial capital charges for water deliveries under this subcontract. Credit provided to the Subcontractor shall include interest from the date Subcontractor's funds are transferred to the United States through the effective date of credit for payment of capital costs as recorded in the Contractor's records. Interest credited to the Subcontractor shall be at an annual rate of 1 (one) percent less than the weighted rate received by the Contractor on all investments during the period for which the Subcontractor's payments earn an interest credit.

(e) The obligation of the Subcontractor to pay Agricultural Water service capital charges and corresponding OM&R charges to the Contractor as provided in Articles 5.1 and 5.2 hereof is a general obligation of the Subcontractor notwithstanding the manner in which the obligation may be distributed among the Subcontractor's water users and notwithstanding the default of individual water users in their obligations to the Subcontractor.

(f) Payment of the agricultural subcontract charge and all Agricultural Water service capital and corresponding OM&R charges becoming due hereunder prior to or on

the dates stipulated in Articles 5.1 and 5.2 is a condition precedent to delivery of Agricultural Water under this subcontract.

(g) The Subcontractor shall not furnish Agricultural Water made available pursuant to this subcontract to parties which are in arrears in the payment of charges as levied or established by the Contractor.

(h) If deliveries of Project Agricultural Water to the Subcontractor are less than that which has been paid for in advance, the Subcontractor shall be entitled to be reimbursed by the Contractor for the appropriate portion of such advance payments prior to the date of the Subcontractor's next payment of water service charges.

5.3 Loss of Entitlement. The Subcontractor shall have no right to delivery of water from Project facilities during any period in which the Subcontractor may be in arrears in the payment of any charges due the Contractor. The Contractor may sell to another entity any water determined to be available under the Subcontractor's entitlement for which payment is in arrears; *Provided, however,* That the Subcontractor may regain the right to use any unsold portion of the water determined to be available under the original entitlement upon payment of all delinquent charges plus any difference between the subcontractual obligation and the price received in the sale of the water by the Contractor and payment of charges for the current period.

5.4 Refusal to Accept Delivery. In the event the Subcontractor fails or refuses in any Year to accept delivery of the quantity of water available for delivery to and required to be accepted by it pursuant to this subcontract, or in the event the Subcontractor in any Year fails to

submit a schedule for delivery as provided in Article 4.4 hereof, said failure or refusal shall not relieve the Subcontractor of its obligation to make the payments required in this subcontract. The Subcontractor agrees to make payment for available water which is refused in the same manner as if said water were scheduled for delivery to and accepted by it in accordance with this subcontract except as provided in Subarticle 4.3(e) and Article 5.3; *Provided, however,* That if the Subcontractor shall require Distribution Works constructed pursuant to Section 309(b) of the Basin Project Act, as amended, to transport water from the Central Arizona Project aqueduct to the point of treatment or use, then the Subcontractor shall not be required to pay capital or OM&R charges until January 1, 1990, or until such time as the Subcontractor begins taking Project Water through the Distribution Works contructed pursuant to a repayment contract under the aforementioned Act, whichever comes first.

5.5 Charge for Late Payments. The Subcontractor shall pay a late payment charge on installments or charges which are received after the due date. The late payment charge percentage rate calculated by the Department of the Treasury and published quarterly in the *Federal Register* shall be used; *Provided,* That the late payment charge percentage rate shall not be less than 0.5 percent per month. The late payment charge percentage rate applied on an overdue payment shall remain in effect until payment is received. The late payment rate for a 30-day period shall be determined on the day immediately following the due date and shall be applied to the overdue payment for any portion of the 30-day period of delinquency. In the case of partial late payments, the amount

received shall first be applied to the late charge on the overdue payment and then to the overdue payment.

6. GENERAL PROVISIONS:

6.1 Repayment Contract Controlling. Pursuant to the Repayment Contract, the United States has agreed to construct and, in the absence of an approved Operating Agency, to operate and maintain the works of the Central Arizona Project and to deliver Project Water to the various subcontractors within the Project Service Area; and the Contractor has obligated itself for the payment of various costs, expenses, and other amounts allocated to Contractor pursuant to Article 9 of the Repayment Contract. The Subcontractor expressly approves and agrees to all the terms presently set out in the Repayment Contract including Subarticle 8.8(b)(viii) thereof, or as such terms may be hereafter amended, and agrees to be bound by the actions to be taken and the determinations to be made under that Repayment Contract, except as otherwise provided herein.

6.2 Notices. Any notice, demand or request authorized or required by this subcontract shall be deemed to have been given when mailed, postage prepaid, or delivered to the Regional Director, Lower Colorado Region, Bureau of Reclamation, P. O. Box 427, Boulder City, Nevada 89005, on behalf of the Contractor or Subcontractor; to the Central Arizona Water Conservation District, Suite 706, 111 West Monroe, Phoenix, Arizona 85003, on behalf of the United States or Subcontractor; and to the Central Arizona Irrigation and Drainage District, P. O. Box 605, Eloy, Arizona 85321 on behalf of the United States or Contractor. The designation of the addressee or

the address may be changed by notice given in the same manner as provided in this Article for other notices.

6.3 Water Conservation Program.

(a) While the contents and standards of a given water conservation program are primarily matters of State and local determination, there is a strong Federal interest in developing an effective water conservation program because of this subcontract. The Subcontractor shall develop and implement an effective water conservation program for all uses of water which is provided from or conveyed through Federally constructed or Federally financed facilities. That water conservation program shall contain definite goals, appropriate water conservation measures, and time schedules for meeting the water conservation objectives.

(b) A water conservation program, acceptable to the Contractor and the Contracting Officer, shall be in existence prior to one or all of the following: (1) service of Federally store/conveyed water; (2) transfer of operation and maintenance of the Project facilities to the Contractor or Operating Agency; or (3) transfer of the Project to an operation and maintenance status. The distribution and use of Federally stored/conveyed water and/or the operation of Project facilities transferred to the Contractor shall be consistent with the adopted water conservation program. Following execution of this subcontract, and at subsequent 5-year intervals, the Subcontractor shall resubmit the water conservation plan to the Contractor and the Contracting Officer for review and approval. After review of the results of the previous 5 years and after consultation with the Contractor, the Subcontractor and

the Arizona Department of Water Resources or its successor, the Contracting Officer may require modifications in the water conservation program to better achieve program goals.

6.4 Rules, Regulations, and Determinations.

(a) The parties agree that the delivery of irrigation water or use of Federal facilities pursuant to this subcontract is subject to Reclamation law, as amended and supplemented, including but not limited to the Reclamation Reform Act of 1982 (Public Law 97-293).

(b) The Subcontractor and the Contractor further agree to abide by final rules and regulations promulgated by the Secretary of the Interior covering the enforcement and administration of said limitations and provisions of Reclamation law as amended and supplemented by the Reclamation Reform Act of 1982, including the payment of full costs as provided therein.

(c) The Contracting Officer shall have the right to make, after an opportunity has been offered to the Contractor and Subcontractor for consultation, rules and regulations consistent with the provisions of this subcontract, the laws of the United States and the State of Arizona, to add to or to modify them as may be deemed proper and necessary to carry out this subcontract, and to supply necessary details of its administration which are not covered by express provisions of this subcontract. The Contractor and Subcontractor shall observe such rules and regulations.

(d) Where the terms of this subcontract provide for action to be based upon the opinion or determination of

any party to this subcontract, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonabe opinions or determinations. In the event that the Contractor or Subcontractor questions any factual determination made by the Contracting Officer, the findings as to the facts shall be made by the Secretary only after consultation with the Contractor or Subcontractor and shall be conclusive upon the parties.

6.5 Officials Not to Benefit.

(a) No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this subcontract or to any benefit that may arise here-from. This restriction shall not be construed to extend to this subcontract if made with a corporation or company for its general benefit.

(b) No official of the Subcontractor shall receive any benefit that may arise by reason of this subcontract other than as a water user within the Project and in the same manner as other water users within the Project.

6.6 Assignment Limited – Successors and Assigns Obligated.

The provisions of this subcontract shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this subcontract or any part or interest therein shall be valid until approved by the Contracting Officer.

6.7 Judicial Remedies Not Foreclosed. Nothing herein shall be construed (a) as depriving any party from pursuing

and prosecuting any remedy in any appropriate court of the United States or the State of Arizona which would otherwise be available to such parties even though provisions herein may declare that determinations or decisions of the Secretary or other persons are conclusive or (b) as depriving any party of any defense thereto which would otherwise be available.

6.8 Books, Records, and Reports. The Subcontractor shall establish and maintain accounts and other books and records pertaining to its financial transactions, land use and crop census, water supply, water use, changes of Project works, and to other matters as the Contracting Officer may require. Reports thereon shall be furnished to the Contracting Officer in such form and on such date or dates as he may require. Subject to applicable Federal laws and regulations, each party shall have the right during office hours to examine and make copies of each other's books and records relating to matters covered by this subcontract.

6.9 Changes in Subcontractor's Geographical Jurisdiction. While this subcontract is in effect, no changes shall be made in the Subcontractor's geographical jurisdiction, by inclusion or exclusion of lands, by dissolution, consolidation, merger or otherwise, except upon the Contracting Officer's written consent.

6.10 Equal Opportunity.

During the performance of this subcontract, the Subcontractor agrees as follows:

(a) The Subcontractor shall not discriminate against any employee or applicant for employment because of race,

color, religion, sex, or national origin. The Subcontractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Subcontractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(b) The Subcontractor shall, in all solicitations or advertisements for employees placed by or on behalf of the Subcontractor, state that all qualified applicants shall receive consideration for employment without discrimination because of race, color, religion, sex, or national origin.

(c) The Subcontractor shall send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Contracting Officer, advising said labor union or workers' representative of the Subcontractor's commitments under Section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Subcontractor shall comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Subcontractor shall furnish all information and reports required by said amended Executive Order and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and shall permit access to its books, records, and accounts by the Contracting Officer and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Subcontractor's noncompliance with the nondiscrimination clauses of this subcontract or with any of the rules, regulations, or orders, this subcontract may be canceled, terminated, or suspended, in whole or in part, and the Subcontractor may be declared ineligible for further Government contracts in accordance with procedures authorized in said amended Executive Order and such other sanctions may be imposed and remedies invoked as provided in said amended Executive Order, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Subcontractor shall include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of said amended Executive Order, so that such provisions shall be binding upon each subcontractor or vendor. The Subcontractor shall take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event a Subcontractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the Subcontractor may request the United

States to enter into such litigation to protect the interest of the United States.

6.11 Title VI, Civil Rights Act of 1964

The Subcontractor agrees that it shall comply with Title VI of the Civil Rights Act of July 2, 1964 (78 Stat. 241), and all requirements imposed by or pursuant to the Department of the Interior Regulation (43 CFR 17) issued pursuant to that title, to the end that, in accordance with Title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Subcontractor receives financial assistance from the United States and hereby gives assurance that it shall immediately take any measures to effectuate this agreement.

(b) If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Subcontractor by the United States, this assurance obligates the Subcontractor, or in the case of any transfer of such property, any transferee for the period during which the real property or structure is used for a purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance obligates the Subcontractor for the period during which it retains ownership or possession of the property. In all other cases, this assurance obligates the Subcontractor for the period during which the Federal financial assistance is extended to it by the United States.

(c) This assurance is given in consideration of and for the purpose of obtaining any and all Federal grants,

loans, contracts, property, discounts, or other Federal financial assistance extended after the date hereof to the Subcontractor by the United States, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The Subcontractor recognizes and agrees that such Federal financial assistance shall be extended in reliance on the representations and agreements made in this assurance, and that the United States shall reserve the right to seek judicial enforcement of this assurance. This assurance is binding on the Subcontractor, its successors, transferees, and assignees.

6.12 Confirmation of Subcontract. The obligation of the United States pursuant to this subcontract shall be contingent upon its authorization or ratification by the qualified electors of the Subcontractor at an election held for that purpose. The Subcontractor shall furnish the Contracting Officer and the Contractor with a copy of the results of such election. The Subcontractor, after authorization or ratification by election and upon the execution of this subcontract, shall promptly seek a final decree of the proper court of the State of Arizona approving and confirming the subcontract and decreeing and adjudging it to be lawful, valid, and binding on the Subcontractor. The Subcontractor shall furnish to the United States a certified copy of such decree and of all pertinent supporting records. This subcontract shall not be binding on the United States, the Contractor, or the Subcontractor until such final decree has been entered.

6.13 Contingent on Appropriation or Allotment of Funds. The expenditure or advance of any money or the performance of any work by the United States hereunder

which may require appropriation of money by the Congress or the allotment of funds shall be contingent upon such appropriation or allotment being made. The failure of the Congress to appropriate funds or the absence of any allotment of funds shall not relieve the Subcontractor from any obligation under this subcontract. No liability shall accrue to the United States in case such funds are not appropriated or allotted.

IN WITNESS WHEREOF, the parties have executed this subcontract No. 4-07-30-W0045 the day and year first above-written.

Legal Review and Approval

THE UNITED STATES OF AMERICA

By: /s/ [Illegible]
Field Solicitor,
Phoenix, Arizona

By: /s/ [Illegible]
Regional Director
Lower Colorado Region
Bureau of Reclamation

CENTRAL ARIZONA WATER CONSERVATION DISTRICT

Attest: /s/ Lynn H. Sharp
Secretary

By: /s/ Dale R. Shumway
Title: president

Central Arizona Irrigation and Drainage District

Attest: [Illegible]
Secretary

By: /s/ Norman Pritzer
Title: President

Richard N. Morrison, #005269
M. Byron Lewis, #002047
Mark A. McGinnis, #013958
SALMON, LEWIS & WELDON, P.L.C.
Attorneys at Law
2850 East Camelback Road, Suite 200
Phoenix, Arizona 85016
(602) 801-9060

Attorneys for Defendants Central Arizona Irrigation and Drainage District

[RELEVANT EXCERPTS]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINAL

JOHN E. SMITH and MARY LOU SMITH, husband and wife; JOHN E. SMITH, as Trustee of the SMITH FAMILY TRUST; and PRETZER LAND AND CATTLE COMPANY, an Arizona corporation, et al.,

Plaintiffs,

vs.

MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, an Arizona municipal corporation, and CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, an Arizona municipal corporation, political subdivisions of the State of Arizona, et al.,

Defendants.

No. CV 2001-00924

CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICTS STATEMENT OF FACTS

(Assigned to the Hon. Kelly M. Robertson)

Pursuant to Rule 56(c) of the Arizona Rules of Civil Procedure, Defendant Central Arizona Irrigation and Drainage District ("CAIDD") responds to Plaintiffs' Supplemental Statement of Facts filed on December 11, 2003. CAIDD also submits its own Separate Statement of Facts, which in addition to the parties' January 2, 2002 Joint Statement of Facts ("JSOF") and CAIDD's response to Plaintiffs' Supplemental Statement of Facts, supports the denial of Plaintiffs' motion for partial summary judgment and the grant of judgment in favor of CAIDD as a matter of law.

* * *

CAIDD'S SEPARATE STATEMENT OF FACTS

In addition to its response to Plaintiffs' Supplemental Statement of Facts, CAIDD also submits its own Separate Statement of Facts in support of the denial of Plaintiffs' partial summary judgment motion and the grant of CAIDD's cross-motion.

* * *

Financial Difficulties for CAP Agricultural Water Users in the Early 1990s

16. Not long after commencement of CAP water delivery in CAIDD and surrounding agricultural areas in 1990, it became clear that the use and payment for CAP water by various individuals and entities presented substantial difficulties not previously fully understood. The cost of CAP Subcontract water to farmers, in Pinal County and elsewhere, was going to be substantially higher than the cost of other water supplies (e.g., groundwater from pumps) and also substantially higher than most farmers and irrigation districts could afford.

See Ward Affidavit, *supra*, ¶ 13; *see also generally* P. Wilson, "An Economic Assessment of Central Arizona Project Agriculture: A Report Submitted to the Office of the Governor and the Arizona Department of Water Resources" (November 1992) [excerpts attached as Exhibit 6 to Motion to Dismiss].

17. In addition to the high costs of water, CAIDD also faced substantial debt service on the private bond debt and on the loans made by the Federal Government to construct the water distribution facilities necessary to bring CAP water from the main CAP aqueduct and to deliver groundwater to the individual farms. *See* Contract Between the United States and the Central Arizona Irrigation and Drainage District Providing for Construction of a Water Distribution System (November 21, 1983) [JSOF Exhibit 5]; *see also* Ward Affidavit, *supra*, ¶ 14. Because the loans to the Federal Government are authorized by Section 9(d) of the Federal Reclamation Act, that portion of the debt is commonly referred to as "9(d) debt."

18. As a result of these problems, CAIDD and New Magma Irrigation and Drainage District, as well as numerous individual farmers, filed for bankruptcy protection. In addition, the Governor established two different study groups to search for solutions to two interrelated problems facing the state: (1) the inability of districts and farmers to pay for CAP water under the existing subcontracts; and (2) the State's inability to utilize a substantial portion of the Colorado River water that had been allocated for the CAP. *See* Ward Affidavit, *supra*, ¶ 15; *see also generally* Report of Governor's Task Force on Central Arizona Project Issues (August 27, 1992) [copy attached as Exhibit 8 to Motion to Dismiss]; Governor's Central Arizona Project Advisory Committee, Final Report and Recommendations

(October 1993) [copy attached as Exhibit 9 to Motion to Dismiss].

19. Part of the outgrowth of the Governor's Task Force and Advisory Committee was a temporary restructuring of the contractual arrangements for the delivery of CAP water to agricultural users. The goal was to reduce the price of CAP water to districts and, consequently, to farmers in order to provide incentive to increase their use of CAP water. CAIDD entered into a letter agreement with CAWCD in late 1993 to accomplish these purposes. *See* Letter Agreement between CAWCD and CAIDD (November 8, 1993) ("Letter Agreement") [copy attached as Exhibit 10 to Motion to Dismiss]; *see also* Ward Affidavit, *supra*, ¶ 16.

20. In the Letter Agreement, CAIDD agreed, for the term of the Letter Agreement, to waive its right to receive CAP water delivery under the Subcontract. *See* Letter Agreement, *supra*, ¶ 1, at 1. CAIDD further agreed, for the term of the Letter Agreement, to waive any contractual right it had to convert its CAP water use from agricultural to municipal and industrial ("M&I") purposes. *See id.* ¶ 2, at 2. In exchange, CAWCD agreed to allow CAIDD the opportunity to purchase CAP water for agricultural purposes pursuant to a separate contract between CAIDD and CAWCD. *Id.* at 3.

* * *

22. As anticipated by the Letter Agreement, CAIDD soon thereafter entered into a separate interim contract with CAWCD for delivery of CAP water for agricultural purposes. *See* Agreement Between the Central Arizona Water Conservation District and Central Arizona Irrigation and Drainage District Providing for the Delivery of

Excess Central Arizona Project Water (January 1, 1994) ("1994 Excess Water Contract") [copy attached as Exhibit 11 to Motion to Dismiss]. This contract provided for the delivery of irrigation water at a total cost that was substantially less than that which CAIDD would have paid under the Subcontract. This agreement terminated on December 31, 2003. *See id.; see also* Ward Affidavit, *supra,* ¶ 19.

23. CAIDD executed the 1994 Excess Water Contract at essentially the same time the Secretary declared CAP construction to be substantially complete. Prior to the notice of substantial completion, CAIDD had received CAP water for a few years under a series of low-cost interim contracts. Neither CAIDD nor any of the Plaintiffs has ever received, delivered, or used any water under the actual Subcontract. *See* Exhibit A, ¶ 9.

Water Settlement Negotiations

24. In part because the 1994 Excess Water Contract expired on its own terms at the end of 2003, CAIDD has been in contact with representatives of CAWCD and the United States in recent years to discuss possible future options. The United States and CAWCD have an ongoing dispute regarding the overall repayment of the cost of building the CAP, which resulted in the filing of a lawsuit in the United States District Court for the District of Arizona. *See Central Arizona Water Conservation Dist. v. United States,* D. Ariz., Nos. CIV 95-65-TUC-EHC and CIV 95-1725-PHX-EHC (consolidated) ("*CAWCD v. U.S.*"). CAIDD intervened as a party in that lawsuit. The dispute between the United States and CAWCD is subject to a

conditional settlement between the two entities. *See* Exhibit A, ¶ 10.

25. The *CAWCD v. U.S.* settlement is conditioned in part upon the settlement of water right claims by and on behalf of the Gila River Indian Community ("GRIC"). As a result, the United States, CAWCD, and various other non-Indian entities began investigating various options whereby CAIDD and others would exchange their existing CAP subcontracts for an agreement by CAWCD to continue to make CAP water available to those entities for agricultural purposes under terms similar to those stated in the 1994 Excess Water Contract. Those negotiations involved numerous parties and lasted several years. *See* Exhibit A, ¶ 11.

26. On December 5, 2002, CAWCD, the State of Arizona acting through the Arizona Department of Water Resources, and the United States of America reached agreement on the terms of the Arizona Water Settlement Agreement for the purposes of, among others, effectuating the *CAWCD v. U.S.* settlement and making certain quantities of CAP water available to the United States for allocation to various Arizona Indian communities. CAIDD is not a party to the Arizona Water Settlement Agreement. That agreement, however, is the basis for a comprehensive series of agreements involving many entities, including CAIDD. Full implementation of the Arizona Water Settlement Agreement is conditioned upon a number of future events, including passage of federal authorizing legislation. *See* Exhibit A, ¶ 12.

27. The Arizona Water Settlement Agreement, if and when fully implemented, would resolve disputes over CAIDD's CAP water contracts and provide for a new CAP

excess water contract with favorable pricing commitments through 2030, in exchange for the relinquishment of CAP-eligible acres' rights under CAIDD's Subcontract. *See* Exhibit A, ¶ 13.

28. The current estimated price of water that would be delivered under the Subcontract in 2004 is $76.00 per acre-foot, and the price of water under the excess water contract would be approximately $28.00 per acre-foot in 2004. *See* Exhibit A, ¶ 14.

* * *

CAIDD's Decision to Participate in the Settlement

31. The CAIDD Board of Directors took significant steps to review the benefits to CAIDD from participating in the comprehensive settlement and to obtain input from landowners on the relevant issues prior to executing the new contracts. *Id.* ¶ 17.

32. On April 17, 2003, CAIDD held a special election to obtain the landowners' views on whether CAIDD should relinquish some or all of its Subcontract entitlement. The results of that election were that landowners holding 29,380.29 acres in CAIDD voted in favor of amending the Subcontract to effectuate relinquishment under the settlement, and landowners owning 3,476 acres were opposed. *Id.* ¶ 18.

* * *

37. Neither CAIDD nor any of the Plaintiffs has attempted to comply with the Arizona prior appropriation statutes to obtain an appropriative right to receive Colorado River water though the CAP. *Id.* ¶ 28.

DATED this 31st day of December, 2003.

SALMON, LEWIS & WELDON, P.L.C.

By /s/ Mark A. McGinnis
Richard N. Morrison
M. Byron Lewis
Mark A. McGinnis
2850 E. Camelback Road,
Suite 200
Phoenix, AZ 85016
Attorneys for CAIDD

ORIGINAL of the foregoing with attachment, mailed for filing this 31st day of December, 2003 to:

Clerk of the Court
Pinal County Superior Court
P.O. Box 2730
Florence, AZ 85232-2730

AFFIDAVIT OF PAUL R. ORME

STATE OF ARIZONA)
) ss
County of Maricopa)

[RELEVANT EXCERPTS]

PAUL R. ORME, being first duly sworn upon his oath deposes and says:

1. He is an attorney licensed to practice law in Arizona, with his primary office in Mayer, Arizona. He is General Counsel for the Central Arizona Irrigation and Drainage District ("CAIDD") and the Maricopa-Stanfield Irrigation & Drainage District ("MSIDD") in Pinal County, Arizona. He has been an attorney for CAIDD and MSIDD since 1980 and has been General Counsel for both districts since May 1995.

2. In his role as an attorney for CAIDD and MSIDD, he was personally involved in negotiating, drafting, and implementing various contracts and agreements relating to the receipt of Central Arizona Project ("CAP") water by the districts in the 1980s, as well as certain contracts and agreements relating to the districts' delivery of irrigation water to their respective landowners during that same period.

3. As General Counsel for both districts since 1995, he has been personally involved in discussions regarding the Arizona Water Settlement Agreement and a complex series of agreements involving the districts' exchange of their existing CAP Subcontracts for a long-term excess CAP water contract and certain other benefits.

4. This affidavit is submitted in support of the districts' responses to Plaintiffs' Motion for Partial Summary Judgment filed on December 11, 2003 in *Smith, et al.*

v. Maricopa-Stanfield Irrigation & Drainage District, et al. (Pinal County Superior Court No. Cv2001-00924) ("Plaintiffs' Motion") and in support of the districts' cross-motions for summary judgment in that same cause. The statements in this affidavit are based upon Mr. Orme's personal knowledge and upon review of records maintained by CAIDD and MSIDD in the ordinary course of their business.

* * *

Use of CAP Subcontract Water

9. CAIDD and MSIDD executed 1994 Excess Water Contracts at essentially the same time as the Secretary of the Interior declared CAP construction to be substantially complete. *See* Agreements Between the Central Arizona Water Conservation District and Central Arizona Irrigation and Drainage District and Maricopa-Stanfield Irrigation and Drainage District Providing for Delivery of Excess Central Arizona Project Water (January 1, 1994) ("1994 Excess Water Contracts"). Prior to the notice of substantial completion, CAIDD and MSIDD had received CAP water for a few years under a series of low-cost interim contracts. Neither CAIDD nor MSIDD (or any of their landowners) ever received, delivered, or used any CAP water under the actual Subcontracts. *See* Subcontracts Among the United States, the Central Arizona Water Conservation District, the Central Arizona Irrigation and Drainage District and Maricopa-Stanfield Irrigation & Drainage District Providing for Water Service (November 21, 1983) ("Subcontracts").

Water Settlement Negotiations

10. In part because the 1994 Excess Water Contracts expired on their own terms at the end of 2003, CAIDD and MSIDD have been in contact with representatives of CAWCD and the United States in recent years to discuss possible future options. The United States and CAWCD have an ongoing dispute regarding the overall repayment of the cost of building the CAP, which resulted in the filing of a lawsuit in the United States District Court for the District of Arizona. *See Central Arizona Water Conservation Dist. v. United States*, D. Ariz., Nos. CIV 95-65-TUC-EHC and CIV 95-1725-PHX-EHC (consolidated) ("*CAWCD v. U.S.*"). CAIDD intervened as a party in that lawsuit. The dispute between the United States and CAWCD is subject to a conditional settlement between the two entities.

11. The *CAWCD v. U.S.* settlement is conditioned in part upon the settlement of water right claims by and on behalf of the Gila River Indian Community ("GRIC"). As a result, the United States, CAWCD, and various other non-Indian entities began investigating various options whereby CAIDD, MSIDD and others would exchange their existing CAP subcontracts for an agreement by CAWCD to continue to make CAP water available to those entities for agricultural purposes under terms similar to those stated in the 1994 Excess Water Contracts. Those negotiations involved numerous parties and lasted several years.

12. On December 5, 2002, CAWCD, the State of Arizona acting through the Arizona Department of Water Resources, and the United States of America reached agreement on the terms of the Arizona Water Settlement Agreement for the purposes of, among others, effectuating

the *CAWCD v. U.S.* settlement and making certain quantities of CAP water available to the United States for allocation to various Arizona Indian communities. CAIDD and MSIDD were not parties to the Arizona Water Settlement Agreement. That agreement, however, is the basis for a comprehensive series of agreements involving many entities, including CAIDD and MSIDD. Full implementation of the Arizona Water Settlement Agreement is conditioned upon a number of future events, including passage of federal authorizing legislation.

13. The Arizona Water Settlement Agreement, if and when fully implemented, would resolve disputes over CAIDD's and MSIDD's CAP water contracts and provide for new CAP excess water contracts with favorable pricing commitments through 2030, in exchange for the relinquishment of CAP-eligible acres' rights under the Subcontracts.

14. The current estimated price of water that would be delivered under the Subcontracts in 2004 is $76.00 per acre-foot, and the price of water under the excess water contracts would be approximately $28.00 per acre-foot in 2004.

* * *

CAIDD's Decision to Participate in the Settlement

17. The CAIDD Board of Directors took significant steps to review the benefits to CAIDD from participating in the comprehensive settlement and to obtain input from landowners on the relevant issues prior to executing the new contracts.

18. On April 17, 2003, CAIDD held a special election to obtain the landowners' views on whether CAIDD should

relinquish some or all of its Subcontract entitlement. The results of that election were that landowners holding 29,380.29 acres in CAIDD voted in favor of amending the Subcontract to effectuate relinquishment under the settlement, and landowners owning 3,476 acres were opposed.

* * *

MSIDD's Decision to Participate in the Settlement

23. The MSIDD Board of Directors took significant steps to review the benefits to MSIDD from participating in the comprehensive settlement and to obtain input from landowners on the relevant issues prior to executing the new contracts. The benefits of the GRIC settlement to CAIDD are substantially the same for MSIDD

24. On June 19, 2003, MSIDD held a special election to obtain the landowners' views on whether MSIDD should, pursuant to the Agreements, relinquish some or all of its water rights under preexisting contracts. The results of that election were that landowners holding 28,074 acres in MSIDD voted in favor of relinquishment, and landowners owning 20,295 acres were opposed.

* * *

Prior Appropriation

28. Due to the legal structure of the Law of the River generally and the CAP specifically, neither CAIDD nor MSIDD has attempted to comply with the Arizona prior appropriation statutes to obtain an appropriative right to receive and use Colorado River water through the CAP

and, to the best of Mr. Orme's knowledge and information, Plaintiffs also have made no such attempt.

/s/ Paul R. Orme
PAUL R. ORME

SUBSCRIBED AND SWORN TO before me this 30th day of December, 2003.

/s/ Joyce E. Mlejnek

My Commission Expires:

[LOGO] Notary Public State of Arizona
Maricopa County
Joyce E Mlejnek
Expires March 25, 2004

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No. 03-1566

In the
Supreme Court of the United States

FRANCIS A. ORFF, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF CENTRAL SAN JOAQUIN WATER CONSERVATION DISTRICT* IN SUPPORT OF PETITIONER

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[Continued from Cover]

BRIEF AMICI CURIAE OF

ENTERPRISE IRRIGATION DISTRICT,
KLAMATH BASIN IMPROVEMENT DISTRICT,
KLAMATH DRAINAGE DISTRICT,
KLAMATH HILLS DISTRICT IMPROVEMENT COMPANY,
KLAMATH IRRIGATION DISTRICT,
MALIN IRRIGATION DISTRICT,
MIDLAND DISTRICT IMPROVEMENT COMPANY,
PINE GROVE IRRIGATION DISTRICT,
POE VALLEY IMPROVEMENT DISTRICT,
SHASTA VIEW IRRIGATION DISTRICT,
STOCKTON EAST WATER DISTRICT,
SUNNYSIDE IRRIGATION DISTRICT,
TULELAKE IRRIGATION DISTRICT, AND
WESTSIDE IMPROVEMENT DISTRICT

QUESTION PRESENTED

Amici curiae will address the following question:

Are farmers intended third-party beneficiaries of their irrigation district's water service and repayment contracts with the U.S. Bureau of Reclamation and, therefore, entitled to sue Reclamation for breach thereof, as the Federal Circuit has long held?

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Amici curiae submit this brief supporting petitioners;[1] all parties have consented to its filing. *See* S. Ct. Rule 37.3.

INTERESTS OF AMICI CURIAE

Amici curiae consist of fifteen water-management districts (Districts) in Oregon and California that receive water stored by the Bureau of Reclamation in its Klamath and Central Valley Projects. *Amici curiae* are the: Central San Joaquin Water Conservation District; Enterprise Irrigation District; Klamath Basin Improvement District; Klamath Drainage District; Klamath Hills District Improvement Company; Klamath Irrigation District; Malin Irrigation District; Midland District Improvement Company; Pine Grove Irrigation District; Poe Valley Improvement District; Shasta View Irrigation District; Stockton East Water District; Sunnyside Irrigation District; Tulelake Irrigation District; and Westside Improvement District.

All of these Districts, *amici curiae*, contract with the Bureau of Reclamation (Reclamation) for delivery of project water to the end users—farmers on tens of thousands of acres of high-value agricultural land; the farmers all possess a property right to receive the water from the Reclamation

[1] No counsel for any party to the case authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* contributed financially to the preparation of this brief. *See* S. Ct. Rule 37.6.

projects. All of these Districts presently have suits pending against the United States under the Tucker Act in the U.S. Court of Federal Claims, seeking monetary damages for breach of their water service contracts or for payment of just compensation, in a representative capacity on behalf of their water users. Reclamation's failure to deliver this water to the Districts has caused the Districts to seek monetary damages in the U.S. Court of Federal Claims under the Tucker Act for breach of the water deliver contracts or for the unconstitutional taking of their water rights. *See Klamath Irrigation Dist. v. United States*, No. 01-591L (Oct. 11, 2001); *Stockton East Water Dist. v. United States*, No. 04-541L (April 20, 2004).

How this Court defines intended third-party beneficiary status could have a profound effect on the rights and obligations of all Reclamation Act project contract holders, including *amici curiae*. Reclamation has constructed more than 600 dams and reservoirs in 17 Western states. Of these, Reclamation administers 348 reservoirs with a total storage capacity of 245 million acre-feet, providing one out of five Western farmers (140,000) with irrigation water for 10 million acres of farmland (on which they produce 60 percent of the nation's vegetables and 25 percent of its fruit and nuts). *See* Bureau of Reclamation, *About Us*,

http://www.usbr.gov/main/about/ (last visited November 22, 2004).

SUMMARY OF THE ARGUMENT

At issue in this case is whether water users, who receive water from a U.S. Bureau of Reclamation (Reclamation) water project pursuant to a contract between Reclamation and an irrigation district, are the intended beneficiaries of that contract and therefore, entitled to sue for breach of contract damages under it. This case asks the Court to pick between decisions of two Circuit Courts of Appeal, reversing a Ninth Circuit Court of Appeals decision, *Orff v. United States*, 358 F.3d 1137 (9th Cir. 2004), and adopting the Federal Circuit's analysis set forth in *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed. Cir. 1984).

In *H.F. Allen Orchards*, the Federal Circuit concluded that the water users were the intended third-party beneficiaries of the contracts between Reclamation and the water district. The trial court had dismissed a suit brought by 160 water users as third-party beneficiaries of irrigation districts' contracts with Reclamation on two grounds: (1) lack of third-party beneficiary status; and (2) lack of merits. *See H.F. Allen Orchards v. United States*, 4 Cl. Ct. 601 (1984). The Federal Circuit reversed on the first holding, but affirmed on the second:

> The irrigation districts, which contracted with the Bureau, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the government supplies. It is clear that the appellants, owners of the property at issue, the water, also are intended third-party beneficiaries of the 1945 Consent Decree. Under the rules of the Claims Court "every action shall be prosecuted in the name of the real party in interest." Here the farmers, owners of the water and beneficiaries of the irrigation projects, are the true parties in interest.

Id. at 1572-73, 1576; *see also Henderson County Drainage Dist. No. 3 v. United States*, 53 Fed. Cl. 48 (2002) (holding that individual farmers were third-party beneficiaries to a contract entered into between their drainage districts and the United States).

The minority view, represented by the Ninth Circuit's decision in *Orff v. United States*, 358 F.3d 1137 (9th Cir. 2004), reached a different conclusion, holding that the water users were not the intended third-party beneficiaries of the contract between Reclamation and the water district. *Id.* Not only is the *Orff* decision at odds with decisions from the Federal Circuit, it is at odds with other Ninth Circuit cases involving the same contract and same farmers. *Compare Orff v. United States*, 358 F.3d 1137 (9th Cir. 2004) *with Barcellos & Wolfsen v. Westlands Water District,* 899 F.2d

814, 816 (9th Cir. 1990) (holding water users were third-party beneficiaries under irrigation districts' contracts with Reclamation); *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 731-33 (E.D. Cal. 1993) (recognizing plaintiffs landowners as third-party beneficiaries to the 1963 and 1965 contracts between the United States and Westlands).

As the Federal Circuit correctly concluded in *H.F. Allen Orchards*, the historical context of these water delivery contracts and the statutory structure of the Reclamation Act force an inexorable conclusion that the end water users are the intended third-party beneficiaries of these water delivery contracts. Any other result would be untenable because the subject matter of the contract, the right to receive the water, is held by the water user. Indeed, as the U.S. Department of Interior has repeatedly observed, under state law, neither the water district nor Reclamation can own the water right because they do not put the water to beneficial use; rather, the water right resides in the water user, who most typically is a farmer who puts the water to beneficial use by irrigating his farm crops.

The ability of water users to seek damages for the government's refusal to deliver their water to them under the contract is crucial because in recent years, Reclamation has adopted policies that favor use of the water for environmental

objectives (such as protecting endangered fish) over the contractually intended delivery of the water to farmers for agricultural use. As a result, increasingly, Reclamation chooses to dramatically reduce or not deliver any water at all to the water districts, leaving the water users, farmers, with no water with which to grow their crops. Yet, it is the farmers themselves, and not the water districts, that ultimately suffer when the government breaches the water delivery contracts.

Amici curiae urge this Court to adopt the rule of law set forth by the Federal Circuit, recognizing that landowners do have the right to sue as third-party beneficiaries of irrigation contracts. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984). The Federal Circuit observed that irrigation districts act as a "surrogate for the aggregation of farmers" and that their constituents are the true parties in interest in this type of litigation. *Id.* In upholding the right of the water user to sue individually, the Federal Circuit followed established precedent of this Court and reclamation jurisprudence. *See, e.g., Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Nevada v. United States*, 463 U.S. 110 (1983). Accordingly, the Ninth Circuit's deviation from traditional notions of water (property) rights and reclamation law should be reversed.

ARGUMENT

I. The Structure of the Reclamation Act and the Historical Context in Which the Contracts Were Entered Into, Support the Federal Circuit's Conclusion That the Water Supply Contracts Between the Bureau of Reclamation and Irrigation Districts Were Intended To Benefit the End Water Users.

The contract under scrutiny in this case is a highly specialized agreement, the terms of which are largely dictated by the federal Reclamation Act of 1902. The two entities that entered into the contract, the Bureau of Reclamation and the Westlands Water District, owe their existence to the reclamation laws passed by Congress and 17 Western states. These water delivery and repayment contracts, including the one at issue in this case, can be understood only in the historical and legislative framework in which they were forged.

On the numerous occasions on which this Court has been called upon to interpret the provisions of the Reclamation Act of 1902, 32 Stat. 388 (1902), the Court has repeatedly noted the role that statute played in transforming the arid West from desert into a vast region of fruitful family farms:

> In order to correctly ascertain the meaning of the Reclamation Act of 1902, we must recognize the obvious truth that the history

of irrigation and reclamation before that date was much fresher in the minds of those then in Congress than it is to us today. "[The] afternoon of July 23, 1847, was the true date of the beginning of modern irrigation. It was on that afternoon that the first band of Mormon pioneers built a small dam across City Creek near the present site of the Mormon Temple and diverted sufficient water to saturate some 5 acres of exceedingly dry land. Before the day was over they had planted potatoes to preserve the seed." During the subsequent half century, irrigation expanded throughout the arid States of the West, supported usually by private enterprise or the local community. By the turn of the century, however, most of the land which could be profitably irrigated by such small-scale projects had been put to use. Pressure mounted on the Federal Government to provide the funding for the massive projects that would be needed to complete the reclamation, culminating in the Reclamation Act of 1902.

California v. United States, 438 U.S. 645, 648-49 (1978) (citations omitted).

> [W]ith the passage of the Reclamation Act of 1902, the Federal Government was designated to play a more prominent role in the development of the West. That Act directed the Secretary of the Interior to withdraw from public entry arid lands in specified western States, reclaim the lands through irrigation projects, and then to restore the lands to entry pursuant to the homestead laws and certain conditions imposed by the Act itself.

Nevada v. United States, 463 U.S. 110, 115 (1983) (citation omitted).

In enacting the Reclamation Act, "Congress set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western states." *California*, 438 U.S. at 650. A "revolving fund was established with moneys received from the sale of public lands, and the Secretary of Interior was directed to survey the west and locate and construct irrigation projects, opening up the improved lands to settlement under the homestead laws . . . . Construction costs were to be repaid into the fund by the settlers and landowners in ten annual installments without interest." Frank J. Trelease, *Reclamation Water Rights*, 32 Rocky Mtn. L. Rev. 464, 465 (1960).

Indeed, as the Ninth Circuit stated,

> The Congress that enacted the Reclamation Act of 1902, however, had far greater expectations for the program than simply an increase in the West's agricultural production. With the Reclamation Act, Congress created a blueprint for the orderly development of the West, and water was the instrument by which that plan would be carried out.

Peterson v. United States Dep't of Interior, 899 F.2d 799, 802 (9th Cir. 1990).

Under the Reclamation Act, as originally conceived, the Bureau of Reclamation dealt directly with the farmers, delivering water to them and collecting repayments of the cost of constructing the project facilities. The parties soon realized, however, the significant benefits of organizing a "water users association," the forerunner of the modern water district.[2]

Congress then authorized Reclamation to contract with districts rather than individual users, and, in the Omnibus Adjustment Act of 1926,[3]

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[2] The Act of May 15, 1922, provides in pertinent part:

> That in carrying out the purposes of the Act of June 17, 1902 . . ., and Acts amendatory thereof and supplementary thereto, and known as and called the reclamation law, the Secretary of the Interior may enter into contract with any legally organized irrigation district whereby such irrigation district shall agree to pay the moneys required to be paid to the United States, and in such event water-right applications on the part of landowners and entrymen, in the discretion of the Secretary of the Interior, may be dispensed with . . . .

42 Stat. 541 (1922) (codified in 43 U.S.C § 511).

[3] The Omnibus Adjustment Act of May 25, 1926, provides in pertinent part:

> No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of

> required that all future contracts be made only with irrigation districts. Thus, users now receive reclamation project water through an intermediary, which may be an irrigation district, a conservancy district, a water user's association, or some other form of organization.

Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 387-88 (1997).

> Originally, the Department of the Interior was given responsibility not only for constructing the reclamation projects, but also for administering the distribution of water to agricultural users in a project service area. In 1926, however, Congress amended the reclamation laws to remove from the Department the primary responsibility for distributing water and monitoring its use. Omnibus Adjustment Act § 46, 43 U.S.C. § 423e. Instead, the Secretary of the Interior was directed to enter into long-term water service contracts

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> the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. . . .

Omnibus Adjustment Act of May 25, 1926, ch. 383, § 46, 44 Stat. 636 (1926) (codified in 43 U.S.C. § 423e (2004)).

> with irrigation districts organized under state law. It was left to the individual districts to execute subcontracts with the actual users of water and to deliver the water.

Peterson v. United States Department of the Interior, 899 F.2d 799, 804 (9th Cir. 1990).

To enable water users in reclamation projects to comply with the new requirement that they contract through districts, in 1917, the California legislature enacted a statutory authorization for the creation of water districts, such as Westlands and some of *amici*, for the express purpose of entering into contracts with the Bureau of Reclamation for delivery of water to their water users and collecting the payments due to Reclamation.

> Districts may cooperate and contract with the United States under the Federal Reclamation Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto or any other act of Congress heretofore or hereafter enacted permitting cooperation.

Cal. Water Code § 23195 (2004); *see also* Cal. Water Code § 31150 (authorizing "County water districts" to contract with federal government under reclamation laws); Cal. Water Code § 35875 (authorizing "California water districts" to contract with federal government under reclamation laws); Cal. Water Code § 44000 (authorizing "California water

storage districts" to contract with federal government under reclamation laws); Cal. Water Code § 50970 (authorizing "reclamation districts" to contract with federal government under reclamation laws); Cal. Water Code § 74610 (authorizing "water conservation districts" to contract with federal government under reclamation laws).[4]

As the California Supreme Court has noted, in entering into contracts, performing them, and suing to enforce them, a water district is acting as a representative of its landowners and water users. *Coachella Valley County Water District v. Stevens*, 274 P. 538, 542 (Cal. 1929) ("[N]o good reason has been suggested why . . . the landowners and other water users in the district may not set up such a governmental agency to act in a representative capacity in their behalf.")

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[4] The Oregon legislature adopted similar legislation. *See* Or. Rev. Stat. § 545.511 (2004) (authorizing Board of Directors of irrigation districts to order that an election to authorize contracts with the United States); Or. Rev. Stat. § 547.355 (authorizing the board of supervisors of drainage districts to enter into reclamation contracts with the United States); Or. Rev. Stat. § 552.350 (authorizing Oregon "water improvement districts" to "cooperate with the United States in the manner provided by Congress for flood control, reclamation, conservation and allied purposes"); Or. Rev. Stat. § 553.710 (authorizing Oregon "water control districts" to enter into contracts for construction of works); Or. Rev. Stat. § 554.260 (authorizing the Board of Directors of Oregon corporations for irrigation, drainage, water supply or flood control to enter into a contract with the United States for maintenance and operation of any works).

As the Federal Circuit stated in finding that the water users are third-party beneficiaries of these contracts with the Bureau of Reclamation:

> The irrigation districts, which contracted with the Bureau, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the government supplies. It is clear that the appellants, owners of the property at issue, the water, also are intended third-party beneficiaries of the 1945 Consent Decree.

H.F. Allen Orchards v. United States, 749 F.2d 1571, 1576 (Fed Cir. 1984) (citations omitted).

II. Unlike Water Users Under Typical Utility Contracts, the Water Users Under Reclamation Act Contracts Hold a Property Right To Receive Project Water.

As the Federal Circuit explained in *H.F. Allen Orchards*, what makes the water delivery contract at issue in this case distinguishable from a typical utility contract is that the water users, the third-party beneficiaries, have constitutionally protected rights to the project water upon which the water delivery contracts between Reclamation and the water district are based. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed Cir. 1984) ("The irrigation districts, which contracted with Reclamation, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the government supplies.").[5]

In the seminal case on this issue, *Ickes v. Fox*, 300 U.S. 82 (1937), a suit by 160 of Washington's Yakima Project water users to enjoin the Secretary's threat to cut off their irrigation water, this Court rejected the government's argument that such water users' rights were defined solely by the Sunnyside Water Users' Association's water delivery contract with the United States. (Their third-party beneficiary status under the contract does not appear to have been questioned.) Holding that the reclamation project water users hold vested property rights to receive their water from Reclamation, quite apart from any contractual provision, this Court stated:

> Although the government diverted, stored, and distributed the water, the contention of

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[5] Indeed, the water delivery contracts at issue in this case are distinguishable from the contract at issue in *Klamath Water Users Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), which was a contract to operate a dam to produce hydropower. *Klamath Water Users Ass'n v. Patterson*, 15 F. Supp.2d 990, 992 (D. Ore. 1998). In *Patterson*, the district court had recognized that plaintiffs' water rights derived from their water delivery contracts, not the 1956 hydropower contract: "The 1956 contract is not the source of plaintiffs' rights to water in the Klamath Basin. Rather, their water rights are found primarily in their individual repayment contracts with the federal government and in state water law." *Id.* at 996. The Ninth Circuit agreed.

petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. The government was and remained simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefore, it was provided that the government should have a lien upon the lands *and the water rights* appurtenant thereto – a provision which in itself imports that the water rights belong to another than the lienor, that is to say, to the landowner.

Id. at 94-95 (citations omitted).

This Court so declared because the Reclamation water right was appurtenant to the land:

> [I]t long has been established law that the right to the use of water can be acquired only by prior appropriation for beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.

Id. at 95-96.

Next, in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), an original proceeding to apportion the waters of the Platt River, the United States claimed ownership of waters impounded by the North Platt and Kendrick Act projects. Rejecting the United States' argument, this Court reiterated its *Ickes* holding that the water users (here represented by the state) held a property right in the reclamation project water:

> The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. Indeed [Section] 8 of the Reclamation Act provides as we have seen that "the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."
>
> * * *
>
> The rights of the United States in respect to the storage of water are recognized. So are the water rights of the landowners. To allocate those water rights to the United States would be to disregard the rights of the landowners.

Id. at 614-16 (citations omitted).

And, in *Nevada v. United States*, 463 U.S. 110 (1983), this Court prohibited the Bureau of Reclamation from depriving water users in Nevada's Newlands Project of their property right to receive water. This Court opened its analysis by stating: "We are bound to say that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West." *Id.* at 121.

After reviewing its prior holdings in *Ickes* and *Nebraska*, this Court then stated:

> In the light of these cases, we conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land. As in *Ickes v. Fox* and *Nebraska v. Wyoming*, the law of relevant State and the contracts entered into by the landowners and the United States make this point very clear.

Id. at 126.

The United States itself has affirmed the vitality of these holdings that reclamation project water users own a property right in the project's water. *See* Filings of Claims for Water Rights in General Stream Adjudication, Op. Solicitor, Dep't of Interior, 97 Interior Dec. 21, 25; 1989 WL 506913 at *1, 5 (July 6, 1989) ("[T]he water user who puts the project water to beneficial use obtains a vested property interest in the water right."). This interpretation is entitled to great weight. *California v. United States*, 438 U.S. 645, 676 n.30 (1978).[6]

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[6] This Solicitor's Opinion is, in fact, binding on all Interior Department officials. As the Department of Interior, Department Manual states:

> A. The responsibilities of the Solicitor in 209 DM 3.1A include but are not limited to the authority:
>
> > (11) To issue final legal interpretations, in the form of M-Opinions published in *Decisions of the United States Department of the Interior*, on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary.

Department of Interior, Departmental Manual, 209 DM 3.2, Authority in Specified Matters, *available at* http://elips.doi.gov/elips/release/3537.htm (last visited November 19, 2004). In *Kentucky Resources Council, Inc. v. Office of Surface Mining*, 155 IBLA 354 (2001), the Interior Department Board of Appeals stated that under this provision, it was bound to follow the analysis of a prior Interior Solicitor's Opinion: "Because we are

Petitioners hold water rights that entitle them to receive all the water from the reclamation project that they can beneficially use. CAL. CONST. Art. X, § 2. In Western water law, any right to the use of surface water for irrigation water is appurtenant to the land, subject to beneficial use. *Nevada v. United States*, 463 U.S. 110, 126 (1983) ("Once these lands were acquired by settlers in the Project, the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.").

"The Supreme Court has determined that for water rights obtained by the Bureau in the name of the United States, the water user who puts the project water to beneficial use obtains a vested property interest in the water right." 97 Interior Dec. 21, 25; 1989 WL 506913 at *1, 5. The Solicitor's 1989 opinion comprehensively analyzes the property right in the water use arising from the beneficial use of the water:

> Since *Ickes v. Fox*, the principal that the proprietary interest in the project water right is in the project water users who put the water to beneficial use has been reaffirmed by the Supreme Court on two occasions. In *Nebraska v. Wyoming*, 325 U.S. 589 (1045), the Court . . . found that individual landowners who had put the project water to beneficial use, thereby "perfecting" the water right obtained by the United States, had "become the appropriators of the water rights, the United States being the storer and the carrier."
>
> * * *
>
> Finally, in *Nevada v. United States*, the Supreme Court addressed Government arguments that water decreed to the United States for the Newlands reclamation project in Nevada could be reallocated to an Indian reservation.
>
> * * *
>
> With the issuance of *Nevada v. United States*, the Supreme Court, conclusively reaffirmed the concept that beneficial ownership of reclamation project water right is in the water users who put the water to beneficial use.

97 Interior Dec. 21, 26-27; 1989 WL 506913 at *1, 6 (citations omitted).

Further, in connection with passage of the McCarran Amendment[7] in 1951, the Justice Department told the Senate

bound by the Solicitor's Opinion, as approved by the Secretary, see 209 DM 3.2A(11), we review the OSM Assistant Director's July 20, 1994, decision in accordance with the analysis in that Opinion." *Id.* at 355.

[7] The McCarran Amendment was enacted to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water. Act of July 10, 1952, § 208(d), 66 Stat. 560.

that the water users' water rights are compensable property rights:

> Mr. Veeder: Certainly they have a legal remedy in damages always where the United States has taken more water than it should have. The fifth amendment of the Constitution is the greatest guaranty to a water user that he is not going to be damaged.
> Senator Watkins: How can he enforce it?
> Mr. Veeder: He simply goes into the Federal district court and sues the United States if it is not over $10,000. If it is over $10,000 he goes to the Court of Federal Claims. We are confronted with that all the time. The Gerlach case [*United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950)] is a historic case. They came in and sued us and we paid them.
>
> * * *
>
> Senator Watkins: Suppose it interferes substantially with the rights of others when they impound it? If it does, what happens then?
> Mr. Veeder: I think, then, if any act that we do transgresses the rights of any individual, in my estimation the fifth amendment protects them completely, and they can sue us.

A Bill to Authorize Suits Against the United States to Adjudicate and Administer Water Rights Before a Subcommittee of the Committee on the Judiciary of the United States Senate, 82nd Cong. (Apr. 25, Aug. 3 and 8, 1951) (statement of William H. Veeder, Special Assistant to Attorney General, DOJ).

Thus, as the Government has previously conceded on numerous occasions, water users' rights in this water are compensable property, and the very legislative scheme that permits the government to contract with irrigation districts was created specifically to help landowners manage that property. The Fifth Amendment requires that those landowners have the ability to vindicate the taking of those property rights by an action for just compensation. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (holding state constitutionally required to provide just compensation remedy); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (holding plaintiff had right to jury trial to determine just compensation).

III. As Beneficial Owner of the Water Right and Beneficial User of the Water, the Irrigator Must Be Provided a Legal Process To Vindicate This Right.

In California, as in the other western states, "[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law." Cal. Water Code § 102 (2004). Thus, the term "water right" denotes the

legal right in California "to use the water." *Fullerton v. State Water Resources Control Board*, 90 Cal. App. 3d 590, 598 (1979); *Rancho Santa Margarita v. Vail*, 81 P.2d 533, 11 Cal.2d 501, 554-55 (1938); *Eddy v. Simpson,* 3 Cal. 249, 252 (1853).

Since 1914, the manner provided by California law for the acquisition of surface water rights has been appropriation by the State Water Resources Control Board and its predecessors, which possess sole authority to grant rights to divert and store appropriated surface water in California. Cal. Water Code §§ 1201, 1202, 1225; *see also* Cal. Water Code § 1253 ("The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.").

Because water is a scarce commodity, California, like the other Western states, has adopted the doctrine of beneficial use, which "prohibits waste of water, requires reasonableness of use, method of use, and method of diversion for all uses of water. . . .To the extent the use is wasteful or otherwise unreasonable, it is not part of a water right." Arthur L. Littleworth & Eric L. Garner, *California Water* 28 (1995). Under this doctrine it is the water users, not Reclamation, who make beneficial use of the irrigation

water, and this is the *sine qua non* of the water right permits issued by the California State Water Board. *See, e.g., California v. United States,* 438 U.S. 645, 650-52 (1978) ("If the term "cooperative federalism" had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it. . . . The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.").

Congress, in the Reclamation Act itself, established that:

> The right to the use of water acquired under the provision of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Reclamation Act of 1902, ch. 1093 § 8, 32 Stat. 388 (1902) (amended and codified in 43 U.S.C. § 372 (2003)).

Accordingly, in *Ickes*, this Court determined that an arbitrary contractual limit on the quantity of water to be delivered to Yakima Project irrigators was superceded by the beneficial use rule embedded in both the Reclamation Act and state law because "Under the Reclamation Act, . . . as well as under the law of Washington, 'beneficial use' was

'the basis, the measure, and the limit of the right.'" *Ickes v. Fox*, 300 U.S. 82, 94 (1937) (citation omitted).

On remand, the D.C. Circuit Court of Appeals expanded on this holding:

> The water-rights of appellants are not determined by contract but by beneficial use. The Secretary of the Interior in operating the project is in the position of a carrier of water to all entrymen in the Reclamation project. He is not obligated to furnish any more water than is available. Under the Reclamation Act he is not authorized to furnish any water at all except for beneficial use. He must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington.

Fox v. Ickes, 137 F.2d 30, 33 (D.C. Cir. 1943).

As the Interior Solicitor noted in 1989, "Since *Ickes v. Fox*, the principle that the proprietary interest in the project water right is in the project water users who put the water to beneficial use has been reaffirmed by the Supreme Court on two occasions." 97 Interior Dec. 21, 26; 1989 WL 506913 at *1, 6. The Interior Solicitor also stated that "[w]ith the issuance of *Nevada v. United States*, the Supreme Court, conclusively reaffirmed the concept that beneficial ownership of a reclamation project water right is in the water users who

put the water to beneficial use." 97 Interior Dec. 21, 27; 1989 WL 506913 at *1, 6.

With respect to the Government's mere legal title to project water, the Interior Solicitor observed:

> At first glance, the pronouncement of the Supreme Court in *Ickes* and *Nebraska* would appear to indicate that upon application by water users of project waters to beneficial uses, all interests incident to the water right flow to the project water users. However, as pointed out in *Nebraska v. United States*, these cases "discuss[] the beneficial ownership of water rights in irrigation projects build pursuant to the Reclamation Act." *Nevada* likewise clarifies that where project water rights are obtained by and remain in the name of the United States, the Federal Government retains legal title. This point is important because the Court in *Nevada* speaks of "obligations that necessarily devolve upon [the United States] from having mere title to water rights . . ."

97 Interior Dec. 21, 27; 1989 WL 506913 at *1, 6 (citations omitted). After recognizing the limited claim the United States had to this water, the Solicitor noted the obligations incumbent upon the Government by virtue of possession of that title:

> First, it appears clear that the Court in *Nevada* was referring to the obligation of this Department to obtain necessary water rights for authorized projects pursuant to

section 8 [of the Reclamation Act]. The Court, in reviewing the dual responsibilities that Congress placed upon the Secretary to represent Indian interest and also obtain project water rights stated: " . . . Congress has imposed upon the United Stats in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects . . ."

Beyond the obligation to obtain water, we also find support in *Nevada* for the proposition that the United States is obligated at least to do what is necessary to preserve, maintain, protect, or have confirmed project water rights that are held in the name of the United States. While less explicit than the obligation to obtain initially the water right, we believe the Court's further discussion of the United States' general obligations to deliver water to the beneficial owners of project water rights indicates this result. In *Nevada*, the Court specifically held that the Government could not reallocate project water in a manner that would impair its obligation as legal titleholder to deliver project water to project beneficiaries . . . .

97 Interior Dec. 21, 27-28; 1989 WL 506913 at *1, 7 (citations omitted).

The Federal Government opened its brief in *Nevada* by stating: "The court of appeals has simply permitted a reallocation of the water decreed in Orr Ditch to a single party – the United States – from reclamation uses to a

Reservation use with an earlier priority." In rejecting the Government's position, the Court pointed out that the argument that water decreed to the United States in the Orr Ditch decree for project purposes could be reallocated away from those purposes, "seems wholly to ignore . . . the obligations that necessarily devolve upon [the United States] from having mere title to water rights for the Newlands Project, when the beneficial ownership of these water rights resides elsewhere." Thus, in attempting to reallocate water away from the project, the Federal Government was ignoring and failing to meet its obligation, as titleholder of the project water right, to maintain the project water supply in the amount which had previously been decreed to the project and to which the water users had acquired beneficial ownership.

97 Interior Dec. 21, 28; 1989 WL 506913 at *1, 7 (citations omitted).

In sum, Reclamation is constrained by the fact that title to the water is divided. As noted, the federal government retains only legal title to reclamation water. *Nevada v. United States*, 463 U.S. 110, 127 (1983); 97 Interior Dec. 21, 29, 1989 WL 506913 at *1, 8. Reclamation is not the beneficial user of the water, a point that it has long-since conceded. That beneficial interest in the water is a vested property right appurtenant to petitioners' lands, and beneficial use is the "measure and limit" of that right.

Therefore, because the law recognizes both the beneficial interest and the property interest of landowners in the water (of which they make beneficial use), the Fifth Amendment requires a procedure by which that right can be vindicated. *See, e.g., Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution.").

CONCLUSION

For all of these reasons, *amici curiae* urge this Court to reverse the decision below.

Respectfully submitted,

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No. 03-1566

In the

Supreme Court of the United States

FRANCIS A. ORFF, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WASHINGTON STATE FARM BUREAU, AND IDAHO FARM BUREAU FEDERATION IN SUPPORT OF INTERVENOR-DEFENDANT-RESPONDENT WESTLANDS WATER DISTRICT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation, Washington Farm Bureau, and Idaho Farm Bureau respectfully move this Court for permission to file the attached brief amicus curiae in support of Respondent Westlands Water District.[1] Written consent for amici participation in this case was granted by counsel of record for Petitioners Francis A. Orff, et al., and Respondents Westlands Water District and the United States. Counsel for Respondent Natural Resources Defense Council has withheld its consent to the filing of this brief.

Pacific Legal Foundation (PLF), the largest and most experienced nonprofit public interest law foundation of its kind, has been litigating in support of the rights of individuals to make reasonable use of private property for over 30 years. PLF attorneys have argued before this Court on several occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF attorneys have also represented water owners and water users in lawsuits over federal reduction of water deliveries for endangered species. *See County of Okanogan v. National Marine Fisheries Service*, 347 F.3d 1081 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2094 (2004).

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Amici Washington Farm Bureau and Idaho Farm Bureau Federation are voluntary, nongovernmental, nonpartisan organizations of farm and ranch families in their respective states. These organizations seek solutions to the social and economic problems that affect farming and ranching families and are active on rural issues in the legislative, regulatory, and judicial forums. The Washington and Idaho Farm Bureaus promote production agriculture and protect the interests of their 90,000 members. Made up mostly of small property owners, many of the Farm Bureaus' members rely on federal projects to deliver the water they own or use. Because small, mostly rural water users are subjected to the same kinds of water reductions for the sake of endangered species that led to this litigation, the Farm Bureaus are gravely concerned about the outcome of this case.

Specifically, Amici seek to augment the arguments of Respondent Westlands Water District by clarifying that water rights are indeed a legally protected "real property right" created by state law and that the United States may not redeploy water wherever it pleases simply because it owns the delivery system for those rights. *See* Brief of Intervenor-Respondent Westlands Water District at 24. Further, Amici wish to bring to this Court's attention the frequency with which the United States redirects water for endangered species purposes. Finally, Amici buttress Respondent Westlands Water District's arguments regarding both the proper standard for attaining third party beneficiary status and the proper scope of the inquiry into third party beneficiary status.

For the foregoing reasons, Amici Pacific Legal Foundation, Washington Farm Bureau, and Idaho Farm Bureau respectfully request that this Court GRANT their motion for leave to file the attached brief.

DATED: January, 2005.

Respectfully submitted,

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QUESTION PRESENTED

Whether farmers are "intended" third party beneficiaries of their irrigation district's water service and repayment contracts with the United States Bureau of Reclamation and, therefore, entitled to sue the Bureau as the Federal Circuit has long held, or merely "incidental" third-party beneficiaries and, therefore, not so entitled as the Ninth Circuit holds in the decision below.

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County of Okanogan v. National Marine Fisheries Service, 347 F.3d 1081 (9th Cir. 2003) 13

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Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765) ... 3

German Alliance Insurance Co. v. Home Water Supply Co., 226 U.S. 220 (1912) 14-15

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Juragua Iron Co. v. United States, 212 U.S. 297 (1909) 3

Nebraska v. Wyoming, 325 U.S. 589 (1945) 10-11

Nevada v. United States, 463 U.S. 110 (1983) 9, 11-12, 19

Orff v. United States, 358 F.3d 1137 (9th Cir. 2004) 1, 14, 16

San Remo Hotel L.P. v. City and County of San Francisco, 27 Cal. 4th 643, 41 P.3d 87, 117 Cal. Rptr. 2d 269 (2002) 6

Schneider Moving & Storage Co. v. Prosser's Moving and Storage Co., 466 U.S. 364 (1984) 16

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Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) .. 13-14

Tulare Lake Basin Water Storage Dist. v. United States, 59 Fed. Cl. 246 (2003) 13

United States v. Craft, 535 U.S. 274 (2002) 5

United States v. Great Falls Manufacturing Co., 112 U.S. 645 (1884) 2-3

Wilkinson v. Leland, 27 U.S. (2 Pet.) 627 (1829) 3

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Statutes

43 U.S.C. § 372 ..... 7, 17

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Cal. Water Code § 109(a) 6-7

Miscellaneous

35 Cong. Rec. 6768 (1902) 17-18

Adler, Jonathan L., *Legal Obstacles to Private Ordering in Marine Fisheries*, 8 Roger Williams U. L. Rev. 9 (2002) 6

Bell, D. Craig & Johnson, Norman K., *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 Envtl. L. 1 (1991) ... 4

Darin, Thomas F., *Waste or Wasted?—Rethinking the Regulation of Coalbed Methane Byproduct Water in the Rocky Mountains*, 17 J. Envtl. L. & Litig. 281 (2002) 4

TABLE OF AUTHORITIES—Continued

Page

Davidson, Dow A., *Who Wants Some Water: The Ongoing Battle for the Klamath River Basin and the Need for Moderate Institutional Change to End the War*, 34 Cumb. L. Rev. 531 (2003-2004) 16

Demsetz, Harold, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967) 6

Discourses on Davila, *in* 6 *The Works of John Adams* (Charles Francis Adams ed., Boston, Little Brown 1851) 3, 14

Johnson, K., *The Mythical Giant: Clean Water Act Section 401 and Nonpoint Source Pollution*, 29 Envtl. L. 417 (1999) 18

Locke, John, *Second Treatise of Government* (S.W. Gough ed., Oxford 1966) (1690) 3

Paredes, Troy A., *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 Wm. & Mary L. Rev. 1055 (2004) 5

Posner, Richard, *Economic Analysis of Law* (1992) 6

Regan, Kevin E., *Balancing Public Water Supply and Adverse Environmental Impacts Under Florida Water Law: From Water Wars Toward Adoptive Management*, 19 J. Land Use & Envtl. L. 123 (2003) 5

Sax, Joseph L., *The Constitution, Property Rights and the Future of Water Law*, 61 U. Colo. L. Rev. 257 (1990) 2

TABLE OF AUTHORITIES—Continued

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Schulz, Clifford W. & Weber, Gregory S., *Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations*, 19 Pac. L.J. 1031 (1988) 2

Scott, Anthony, *The Fishery: The Objectives of Sole Ownership*, 63 J. Pol. Econ. 116 (1955) 6

This is the Washington Farm Bureau, available at http://www.wsfb.com/StateFarmBureau/WaFarmBureauHistory.htm (last visited Jan. 6, 2005) 5

Whitworth, Joe S., *A Relic Dam Dislodged by a Dormant Doctrine: The Story of Beneficial Use and Savage Rapids Dam*, 5 U. Denv. Water L. Rev. 183 (2001) 17

IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of Amici are contained in the attached motion to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1993, the United States Bureau of Reclamation (BoR) unilaterally reduced its contractually required Central Valley Project (Project) water deliveries to Westlands Water District (Westlands) by 50%. *See Orff v. United States*, 358 F.3d 1137, 1141 (9th Cir. 2004). The impetus for this reduction was the listing of the Sacramento River winter run chinook salmon and the delta smelt of the Sacramento-San Joaquin Delta as "threatened" species under the Endangered Species Act. *Id.* The National Marine Fisheries Service (NMFS), in its consulting role to BoR, determined that continued operation of the Project would jeopardize the two fish species. *See id.* Petitioners, a group of farmers who are the ultimate beneficial users of the water that the Project delivered to Westlands, sued the United States under a number of theories including breach of contract. *See id.* at 1142. The Ninth Circuit dismissed the farmers' case, holding that the farmers are not parties to the contract nor do they qualify as "intended" third party beneficiaries who, though not parties to the contract, are nevertheless entitled to sue for breach of the contract. *Id.*

Amici support Westlands' arguments by explaining that water is indeed a protected property right and that it is important for this Court to expressly recognize that fact, given the frequency with which the United States appropriates water rights both from water districts and farmers for the alleged benefit of listed species. Further, Amici explain the proper inquiry and standard that courts should use in determining third party beneficiary status and note the importance of preserving the correct standard.

ARGUMENT

I

WATER RIGHTS ARE PROTECTED PROPERTY RIGHTS THAT THE GOVERNMENT MAY NOT SEIZE

A. Water Rights Are Protected Property Rights

This "right to use" water is nearly as old as Western civilization itself, extending to Justinian's Institutes. *See* Clifford W. Schulz & Gregory S. Weber, *Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations*, 19 Pac. L.J. 1031, 1039 (1988) (citing Justinian's Institutes and explaining that, "[a]lthough Roman law itself recognized [the right to use water], it was left to the civilians to develop more fully the incidents of private usufructuary rights in water."). Unsurprisingly, the common law of water dates to Blackstone. *See id.* at 1040 (explaining medieval England's development of law surrounding the right to use water).

As lower courts and scholars alike have recognized, water rights are not "lesser" or "diminished" property rights but are entitled to the full protection of the Constitution. *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996); *see also* Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. Colo. L. Rev. 257, 260 (1990) (explaining that "[w]ater rights are property" equal with any other form of property, though water rights do not enjoy "more protected status than any other sort of property").

This Court has also long recognized that water rights are protected property interests entitled to equal status with land. In *United States v. Great Falls Manufacturing Co.*, 112 U.S. 645, 656 (1884), for example, this Court was called to decide whether government could be held liable when it was "[b]eyond doubt [that] the land and the water-rights and privileges in

question have for nearly 20 years been held and used by officers and agents of the government, without any compensation whatever having been made." This Court repeatedly referred to the land and water rights as "these property rights" and ultimately determined that the government had "taken the property of the claimant for public use." *Id.* In its analysis, this Court drew no distinction between the water rights and the land but regarded each as protected property interests. This Court later confirmed this reading of *Great Falls* in *Juragua Iron Co. v. United States*, 212 U.S. 297, 304 (1909), noting that "the government is under a constitutional obligation to make compensation for any property or property right taken."

That water rights must be regarded as property interests equal to and entitled to the same protection as other property interests is not simply an academic issue; rather it is a matter of individual liberty. For the "fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829). Indeed, government is designed to preserve individual liberty largely by securing rights to private property. *See* John Locke, *Second Treatise of Government* 66 (S.W. Gough ed., Oxford 1966) (1690); *see also Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.P. 1765) ("The great end, for which men entered into society, was to secure their property."). Only a year after the Constitution was adopted, John Adams expressed the Framers' universally shared view that "'[p]roperty must be secured or liberty cannot exist.'" *Discourses on Davila, in* 6 *The Works of John Adams* 280 (Charles Francis Adams ed., Boston, Little Brown 1851), *quoted in Cannon v. Delaware*, 807 A.2d 556, 569 (Del. 2002). Property rights are key to personal liberty and "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

Property rights are vital to a free society, and although the systems for acquiring water and distributing water rights have varied over time, water rights are property as much as land. Simply put, there is "no reason . . . why water rights, which are as vital as land rights, should receive less protection." *Hage*, 35 Fed. Cl. at 172. No matter what this Court decides, it should continue its unbroken practice of recognizing water rights as identical to and worthy of the same protections as other property.

B. Water Use and Certainty of Water Rights Are Vital in the West

It is beyond dispute that, "in the semi-arid to arid West, water is gold." Thomas F. Darin, *Waste or Wasted?—Rethinking the Regulation of Coalbed Methane Byproduct Water in the Rocky Mountains*, 17 J. Envtl. L. & Litig. 281, 288 (2002). It is impossible to overstate the West's reliance on this scarce resource: "water is vital to the economic well-being of the western states." D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 Envtl. L. 1, 25 (1991). Given the western states' water dependence, certainty of one's water rights is vital. *See Arizona v. California*, 460 U.S. 605, 620 (1983) ("Certainty of rights is particularly important with respect to water rights in the Western United States."). Simply put, without sure and protected sources of water, the West cannot function. *See id.* ("The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country.").

It is no exaggeration to say that some land in the West is worthless without water. Indeed, water not only quenches thirsty crops and people, it has a profound impact on land values. In Washington State, nonirrigated farm or pasture land is worth $100 to $500 per acre; when irrigated the same land is

worth $3,000 to $15,000 per acre. *See This is the Washington Farm Bureau, available at* http://www.wsfb.com/StateFarmBureau/WaFarmBureauHistory.htm (last visited Jan. 6, 2005). Thus, eliminating irrigation by seizing water held pursuant to legally protected rights reduces land values, in some cases, to less than 1% of the original value.

Certainty in water rights has three aspects: "1) legal certainty; 2) tenure certainty; and 3) physical certainty." Kevin E. Regan, *Balancing Public Water Supply and Adverse Environmental Impacts Under Florida Water Law: From Water Wars Toward Adoptive Management*, 19 J. Land Use & Envtl. L. 123, 170 (2003). "Legal certainty" refers to protecting water from the illegal or wrongful actions of others. *Id.* "Tenure certainty" involves the protection of water rights against the lawful acts of others that may nevertheless interfere with water use. *Id.* "Physical certainty" relates to ensuring adequate sources of water against drought, poor weather, or other atmospheric problems. *Id.*

This case involves legal certainty in that the Petitioners claim the United States wrongfully withheld the water to which petitioners were entitled. Alternatively, this case involves tenure certainty in that, even if the ESA authorizes BoR to withhold the water due the farmers, they must not be left without a remedy for that loss. Notwithstanding other aspects of the Court's eventual holding in this case, it should uphold the legal or tenure certainty of water rights by affording water rights the same protections as other sticks in the bundle of property rights. *See United States v. Craft*, 535 U.S. 274, 278 (2002) (describing property as "a 'bundle of sticks' ").

This legal certainty in property rights is "a valuable asset that facilitates business and investing." Troy A. Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 Wm. & Mary L. Rev. 1055, 1133-35 (2004). As innumerable

economists and philosophers have noted, and as the course of human history has proved, no one "will take the trouble to husband and maintain a resource unless he has a reasonable certainty of receiving some portion of the product of his management; that is, unless he has some property right in the yield." *See* Jonathan L. Adler, *Legal Obstacles to Private Ordering in Marine Fisheries*, 8 Roger Williams U. L. Rev. 9, 13 n.17 (2002) (quoting Anthony Scott, *The Fishery: The Objectives of Sole Ownership*, 63 J. Pol. Econ. 116, 116 (1955)). Certainty of legal rights and obligations associated with property is the cornerstone of private property. *See, e.g.*, Richard Posner, *Economic Analysis of Law* 32-33 (1992) (discussing need for certain and exclusive property rights); *see also* Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 347 (1967) ("Property rights . . . derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others."). Without certainty, property is at best devalued and at worst impossible to transfer and thus valueless. Without water, property in the West is also devalued and worthless.

C. Congress Has Recognized the Importance of Water Rights by Mandating Deference to State Law Regarding Water Appropriation

Even the State of California, hardly Goliath in the property rights arena,[1] agrees that certainty of water use is a vital property right. California law recognizes the importance of affording water rights the same protections as other property. For example, California Water Code § 109(a) provides:

[1] *See San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643, 692, 41 P.3d 87, 121, 117 Cal. Rptr. 2d 269, 308 (2002) (Brown, J., dissenting) (explaining that private property is "an endangered species in California" and "entirely extinct in San Francisco.").

> The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights. It is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import.

Water rights, specifically certainty of water rights, must be protected in order to avoid catastrophe in the West.

Congress included this important concept in the Reclamation Act by providing that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. Thus, what constitutes beneficial use depends on the laws of the individual states, and Congress expressly deferred to state law regarding appropriation of water. Reading § 372 of the Reclamation Act properly in conjunction with § 383 shows that state law should be used to determine beneficial use when the water at issue is made available due to a Reclamation project:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or

> user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383.

This Court has previously noted Congress' deference to state law concerning water rights. The Court noted that the history of the reclamation relationship between the federal government and the Western States is both long and involved, but contains a consistent thread of purposeful and continued deference to state water law by Congress. *California v. United States*, 438 U.S. 645, 653 (1978). In *California*, this Court noted the precise nature of the deference to state law as it relates to the question in this case:

> From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects: First, and of controlling importance in this case, the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law. . . . The Secretary of the Interior could not take any action in appropriating the waters of the state streams "which could not be undertaken by an individual or corporation if it were in the position for the Government as regards the ownership of its lands."
>
> . . . .
>
> Second, once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law.

California v. United States, 438 U.S. at 665-67. Under California law, nobody can obtain a water right unless he is diverting the water and putting it to beneficial use. If the opposite were true, it would be possible for speculators to acquire huge quantities of water and simply apportion the water

as they saw fit, charging exorbitant prices without regard to use. Or, as with BoR in this case, the nonuser owner could randomly choose whether to deliver needed irrigation water in a particular year and instead use it for another purpose, thus utterly destroying the certainty that is such a necessary component of irrigated agriculture.

Congress' reasons for deferring to state water law were sound: if federal law applied to reclamation projects and water therefrom, two potentially inconsistent water management systems would operate within each state: a federal water law system and a state water law system. *Id.* at 668-69. Legal and practical chaos would be the order (or disorder) of the day.

Under state law, water users who prove they have or will beneficially use the waters of the State of California acquire a right to use that water. This water right, once acquired in part as a result of the water delivery contract, is a protected property right.

D. This Court Has Long Held That Water Users Hold at Least a Beneficial Ownership Interest in the Water Rights Used to Obtain Water from BoR Facilities

This Court has, on a number of occasions, considered whether parties such as the farmers in this case possess water rights in water provided by irrigation facilities, and has concluded that, at a minimum, such parties retain a significant beneficial ownership interest. *See Nevada v. United States*, 463 U.S. 110, 126-27 (1983). According to this Court, the United States holds, at most, a nominal ownership interest that has also been described as mere title: It is "simply a carrier and distributor of the water." *Id.* at 123.

The seminal case is *Ickes v. Fox*, 300 U.S. 82 (1937), in which the underlying issue was whether the United States could reduce the amount of water delivered to irrigated lands from

4.84-acre feet of water to 3.0-acre feet of water. This Court held that the United States could not:

> Although the government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.

Id. at 94-95; *see also id.* at 96 (stating that respondents have fully discharged all their contractual obligations; their water rights have become vested; and ownership is in them and not in the United States.).

A few years later, this Court again considered the issue of water rights ownership in Reclamation Project water in *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945). The Court quoted *Ickes*, and then emphasized the point:

> The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.

Id.

In 1978, the Court again considered the issue of ownership of water rights in water which is stored in Reclamation facilities, and favorably quoted *Ickes v. Fox*, holding:

> "All of these steps make plain that [the Reclamation] projects were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act. We can say here what was said in *Ickes v. Fox*, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937)."

California v. United States, 438 U.S. at 677 (quoting *Nebraska v. Wyoming*, 325 U.S. at 613-14). The Court went on to recount the portions of *Ickes* quoted above, noting the United States' role as water deliverer, not as water owner.

Finally, this Court again considered the nature of water rights associated with irrigation projects in a case in which the United States essentially attempted to reallocate water rights from irrigators to the Pyramid Lake Indian Reservation. The Court was blunt in holding the United States did not have ownership interests in the water rights which would allow it to take that action:

> [W]e conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's ownership of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

Nevada v. United States, 463 U.S. at 126; *see also id.* at 127 (stating the government had obligations that necessarily devolve upon it from having mere title to the water rights for the

Newlands Project, when the beneficial ownership of these water rights resides elsewhere).

E. Government May Not Commandeer Water for Its Own Purposes but Must Deliver That Water to the Districts and the Farmers for Beneficial Use

Clearly then this Court has duly noted and approved continued deference to state water law since Congress enacted the Reclamation Act in 1902. Specifically, this Court has noted that users of water taken from BoR storage facilities are at least the beneficial owners of the associated water rights and that, in contrast, BoR's ownership interest is nominal at most. *See, e.g., Nevada v. United States*, 463 U.S. at 126. As Westlands points out, BoR does not own the water it delivers but rather owns a delivery system for the water; that is, to the extent BoR has any right to this water, it is the right to supply it to Westlands for the farmers' ultimate beneficial use. *See* Brief of Intervenor-Respondent Westlands Water District (Westlands Brief) at 29 (explaining that the United States has a "nominal interest" and that the "water rights would not exist" without the farmers application of the water to th land). This is true because the right to take water out of a river or stream in California is contingent upon putting it to a beneficial use. *See* Cal. Const. art. 10, § 2 ("Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses."). Absent the farmers' use of the water stored in the project, storing it would be purposeless. That is, until the farmers apply the water to the land, there is no beneficial use. A diversion without beneficial use is a half without a whole, and is nothing more than the wasteful hoarding of water.

Given the beneficial use requirement and the fact the Project exists to deliver water for the beneficial use of farming, it is unlawful for BoR to commandeer the water for use by salmon and delta smelt. Unfortunately, BoR has a penchant for reallocating irrigation water from farmers allegedly to benefit wildlife. For example, *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed. Cl. 246 (2003), involved nearly identical circumstances to this case. There, BoR reduced water deliveries to California water users to protect the same species involved in this case, *see id.* at 247, a decision which resulted in a $13,915,364.78 takings verdict, *see id.*

Though the *Tulare Lake* water users were ultimately awarded compensation, this is not always the case. The court in *County of Okanogan v. National Marine Fisheries Service*, 347 F.3d 1081, 1082 (9th Cir. 2003), for example, approved another federal appropriation of water. There, the farmers owned a right to draw water from the Chewuch River but required a ditch across a national forest in order to get that water to their property. *See id.* at 1082-83. The farmers built the ditch pursuant to a permit in the early 1900s and operated it without incident for nearly 100 years. *See id.* In 2000, though, NMFS, the United States Fish and Wildlife Service (FWS) and United States Forest Service (Forest Service) limited the amount of water that could be drawn through the ditch for the benefit of endangered and threatened fish. *See id.* at 1083. Though nothing about the operation of the *ditch* harmed the fish, the government agencies determined that they simply needed more water in the Chewuch River. *See id.* at 1084 ("the biological opinion found that measures were necessary to 'increase the amount of water in the Chewuch River during low flow periods.' "). As here, the Forest Service in *Okanogan* simply denied owners of water rights access to their water because the government wanted it. When the government "physically appropriates [] property, the fact of a taking is typically obvious and undisputed." *Tahoe-Sierra Preservation*

Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 n.17 (2002).

Given the importance of water rights to property in the arid West, this Court should treat water rights as it would any other property. Clear and decisive language recognizing that water rights are co-equal with other property rights will instill certainty in those rights. Rather than a government granted privilege to be freely reallocated among competing users to attain the greatest perceived social (or worse, political) good, the right to use water must be treated as equivalent with rights in real property. Both protect the same end, for " '[p]roperty must be secured or liberty cannot exist.' " *Cannon v. Delaware*, 807 A.2d at 569 (quoting *Discourses on Davila*, *in* 6 *The Works of John Adams* 280).

II

THE NINTH CIRCUIT'S ANALYSIS EFFECTIVELY DESTROYS THIRD PARTY BENEFICIARY STATUS

As Westlands notes, the Ninth Circuit's "narrow view" is inconsistent with this Court's authority and unduly restricts the scope of its inquiry into whether the farmers enjoyed third-party beneficiary status. *See* Westlands Brief at 37.

A. The Ninth Circuit Misstated the Standard for Third Party Beneficiary Status

This Court has held that a person seeking to sue on a contract to which he is not a stated party must "show that it was intended for his direct benefit." *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912). Below, the Ninth Circuit held that the *contract itself* must evince a "clear intent" that the parties intended "to grant [the farmers] enforceable rights." *Orff*, 358 F.3d at 1147. This is a subtle but important transformation of this Court's third party beneficiary standard, and represents an almost impossibly high

burden for third parties to meet. Under the Ninth Circuit's standard, a party may no longer seek to protect its rights by showing the contract was intended for its direct benefit but, instead, must prove the contracting parties intended to grant litigation rights against the contracting parties.

This imposingly high standard turns this Court's *German Alliance* rationale on its head. This Court found that the plaintiffs in that case had no direct interest because the benefit was "only [that] which every citizen has in the performance of every other contract made by and with the government under which he lives." *German Alliance*, 226 U.S. at 231. The farmers in this case, as landowners and beneficial water users, have far more than a "general public interest" in the performance of the contract between BoR and Westlands. Under *German Alliance*, a party must show that the parties intended to directly benefit the third party; under the rule adopted below, a third party must show that the contracting parties intended to see that third party in court.

Regardless of whether the farmers' interest is actually sufficient to grant third party beneficiary status under the proper standard, this Court should not uphold the Ninth Circuit's nearly impossible-to-meet, rogue standard. Rather, this Court should restore its *German Alliance* standard and inquire whether the contract for water deliveries to Westlands for subsequent delivery to the farmers was intended to benefit the farmers. Alternatively, this Court should declare that the Ninth Circuit should have utilized this Court's "direct benefit" standard established in *German Alliance* and remand this case for further consideration consistent with the Court's standard.

B. The Ninth Circuit Improperly Restricted the Inquiry into Third Party Beneficiary Status

In its analysis of whether the farmers qualified for third party beneficiary status, the Ninth Circuit improperly limited itself to the four corners of the contract. *See Orff*, 358 F.3d at 1145-47; *see also* Westlands Brief at 39. As this error no doubt resulted from the improper standard the Ninth Circuit employed, *see section* II.A, *infra*, this Court should re-establish the proper standard. Rather than limiting its review to a narrow "mechanical application" of the contract language, this Court has instructed lower courts to "determine the parties' intent" by reconciling the contract language and surrounding circumstances. *Schneider Moving & Storage Co. v. Prosser's Moving and Storage Co.*, 466 U.S. 364, 370-71 & n.11 (1984). Essentially, this Court determines the parties' intent by analyzing the available evidence surrounding the need for the contract, the service provided, and the parties' motivation for formulating the contract. This traditional rule, which is broader than the Ninth Circuit's new rule, recognizes third party beneficiary status where the parties' intent can be ascertained readily, while limiting this tool to those circumstances in which it is appropriate.

Had the Ninth Circuit reviewed the circumstances under which the contract developed rather than improperly cabining its view, it would have considered the relevant circumstances surrounding both the execution of the 1963 Contract and the purpose for which Congress passed the Reclamation Act which serves as the basis for the contract. For example, the Ninth Circuit should have considered that "Congress passed the Reclamation Act of 1902 in an effort to develop irrigation systems in the Western United States, *with an eye toward agricultural production*." Dow A. Davidson, *Who Wants Some Water: The Ongoing Battle for the Klamath River Basin and the Need for Moderate Institutional Change to End the War*, 34 Cumb. L. Rev. 531, 533 (2003-2004) (emphasis added). The

Ninth Circuit also should have considered that, as part of the 1902 Reclamation Act, Congress declared: "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372.

Thus, in determining whether Westlands and BoR intended the 1963 contract to benefit the farmers directly, the Ninth Circuit should have considered that Congress passed the Reclamation Act to "aide[] the average family farmer in covering the substantial up-front costs involved with damming and irrigation works," demonstrating Congress' "understanding of water's central role in the orderly development of the West." Joe S. Whitworth, *A Relic Dam Dislodged by a Dormant Doctrine: The Story of Beneficial Use and Savage Rapids Dam*, 5 U. Denv. Water L. Rev. 183, 187 (2001). When Congress passed the Act, Representative Sutherland, later a member of this Court, advocated for the Act as follows:

> We propose to take the money derived from the sale of the public lands in the sixteen arid-land States and Territories and create a fund to be used for the purpose of rendering this land useful and habitable. In these sixteen States and Territories there are 600,000,000 acres of public lands. After fifty years of effort upon the part of the people there has been cultivated and irrigated only about 7,500,000 acres. The smaller streams have been appropriated and diverted to the last drop. Private enterprise has constructed many canals from the larger streams and many reservoirs for the impounding of the flood waters. The time has arrived, however, when practically nothing more can be done in the direction

> of an increase of the water supply and the consequent increase in the area of cultivated lands without the aid of the National Government.

35 Cong. Rec. 6768 (Rep. Sutherland) (1902).

Although this information may not be dispositive, it is certainly relevant that one of Congress' objectives in passing the Reclamation Act "was to encourage settlement of the West by providing low-cost irrigation water." K. Johnson, *The Mythical Giant: Clean Water Act Section 401 and Nonpoint Source Pollution*, 29 Envtl. L. 417, 452 (1999).

Amici do not suggest that the Court look under every rock and in every tree to see whether a contract benefits some party; rather, amici assert only that courts be permitted to use their general powers of perception and common sense to determine whether a party was an intended beneficiary. Requiring a court to put on blinders that permit it to look only at the words in the contract is unnecessarily cramped and would lead to unjust results. Instead, this Court, while keeping a strong "direct benefit" standard, must permit courts to look beyond the four corners of the contract to the circumstances that motivated the contract. Under this traditional standard, courts examine whether a contract between A and B is made for the direct benefit of C, but may look in obvious places to see if that is really the case. Under the 9th Circuit's new standard, the Court looks only to the contract to see if the parties express that the contract is for the direct benefit of C. This standard is out of step both with this Court's precedents and contractual reality.

This Court should take into account the circumstances surrounding formation of the contract and the enabling legislation allowing BoR to enter into such water delivery contracts when determining whether the farmers are third party beneficiaries. Alternatively, this Court should remand this case to the lower court so that it may consider whether the contracting parties intended the contract to benefit the farmers.

CONCLUSION

This case represents an important opportunity for this Court to clearly articulate that the right to use water is of equal importance to the right to use real property. Clear and decisive language from this Court will dispel the idea that the right to use water is held at the whim of the government to be redistributed as bureaucrats see fit at any given time and will buttress the all-important certainty required in any property right. Further, this Court should recognize that the United States holds, at most, mere title or a nominal ownership interest in the water, *see Nevada v. United States*, 463 U.S. at 126-27, and that "ownership" is dependant upon the water being delivered to Westlands and ultimately the farmers for beneficial use. Finally, this Court should reiterate and apply the correct standard and conduct the proper inquiry for determining whether the farmers are third party beneficiaries to water delivery contracts. Alternatively, after reiterating the correct standard and scope of inquiry, this Court should return the case to the lower court.

DATED: January, 2005.

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(15)

No. 03-1566

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IN THE SUPREME COURT OF THE UNITED STATES

FRANCIS A. ORFF, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents,

On Petition for A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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OBJECTION OF INTERVENOR-RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, *ET AL.*, TO PACIFIC LEGAL FOUNDATION'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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Respondents-Intervenors Natural Resources Defense Counsel *et al.* object under Supreme Court Rule 37.5 to Pacific Legal Foundation's ("PLF's") motion for leave to file a merits brief *amicus curiae*. PLF's proposed *amicus* brief is untimely under Supreme Court Rule 37.3(a), because it seeks reversal or remand, not affirmance, and should have been filed by November 26, 2004, when petitioners' merits brief was due.

Supreme Court Rule 37.3(a) states that an *amicus curiae* brief "shall be submitted within the time allowed for filing the brief for the party supported, or if in support of neither party, within the time allowed for filing the petitioner's or appellant's brief." Although PLF's proposed *amicus* brief states on its cover that it is submitted "in support of intervenor-Defendant-Respondent Westlands Water District," in fact PLF's proposed brief supports petitioners' position, not the position of respondent United States or any respondent-intervenor, as it challenges the reasoning and holding of the Ninth Circuit and urges this Court either to revese or remand the lower court's ruling.

PLF advances two arguments in its proposed *amicus* brief. First, contrary to the position of all respondents, PLF contends as a threshold matter that petitioners have a state law property right to the water used to irrigate their lands. *Compare* PLF Br. at 5, 9, 12 *with* United States Br. at 34-35 n.15, 41-43; NRDC Br. at 40-

49; Westlands Br. at 24, 35-37. Second, PLF contends that the Ninth Circuit erroneously analyzed the third-party beneficiary issue, arguing that the Ninth Circuit failed to consider petitioners' purported state law property interest and Congress' supposed intent to benefit farmers in enacting the Reclamation Act of 1902, and that the Ninth Circuit's decision should therefore be reversed and remanded. PLF Br. at 15-18. Again, all respondents disagree with PLF's position – both as to PLF's analysis and its proposed result. All respondents urge *affirmance* of the Ninth Circuit, not reversal. And all respondents conclude that federal reclamation policies, as articulated in the Reclamation Act and its various amendments, *support* the decision below and do *not* establish an intent to give water users the right to bring damages suits for breach of a reclamation contract against the United States. *See, e.g.,* United States Br. at 4-5, 17-20, 49; NRDC Br. at 2-6, 28-37; Westlands Br. at 25, 33-38, 47.

Because PLF's proposed *amicus* bref supports petitioners' position, not respondents, that brief should have been lodged no later than November 26, 2005, the date on which the briefs of petitioners and their other *amici* was due. Had PLF timely submitted its proposed brief on that date, respondents could have responded on the merits to the arguments presented. However, PLF did not submit its proposed brief and accompanying motion to this Court until January 7, 2005, thus

providing respondents no opportunity to respond to the legally erroneous arguments presented in PLF's proposed brief. PLF's brief should therefore be rejected as untimely, and its motion for leave to file brief *amicus curiae* should be DENIED.

Dated: January 12, 2005

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